Supreme Court
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97 833 NOV 18 1997

No. 97- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE POLICE ASSOCIATION OF MASSACHUSETTS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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November 18, 1997

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QUESTIONS PRESENTED

1. Whether tax exempt organizations that derive income from advertising do not "regularly carry on" an advertising business if their journal or publication is published only once a year.

2. May the Government, in administering the internal revenue laws, without statutory authority, provide that displays of logos, slogans and other "value-neutral descriptions" of corporate sponsors by certain tax exempt organizations at various sporting events (some nationally televised) in exchange for payments from such sponsors is not the business of advertising but that the publication of similar logos, slogans and even the listing of a sponsor's name, address or telephone number in periodicals published by other tax exempt organizations is the business of advertising.

3. Whether a consent to extend the time to assess tax was ambiguous and therefore could be construed to apply to returns never filed by the Petitioner, or was unambiguous and thus would require the U.S. Tax Court to reform the consent, which that court has held it is empowered to do, despite its not being a court of general equitable jurisdiction.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is an unincorporated association and has no parent company or subsidiary. The caption of this case contains the names of all of the parties to the proceeding in Court of Appeals for the First Circuit which is sought to be reviewed.

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PETITION FOR A WRIT OF CERTIORARI

The State Police Association of Massachusetts (Association) respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the First Circuit entered in this case on August 20, 1997.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals (App. 1a-18a) is reported at 125 F.3d 1 (1st Cir. 1997) and 97-2 U.S.T.C. (CCH) ¶50,627. The opinion of the U.S. Tax Court (App. 19a-53a) is reported at 72 T.C.M. (CCH) 582, Dec. 51,538.

JURISDICTION

The First Circuit Court of Appeals entered its judgement on August 20, 1997. The jurisdiction of this Court is invoked under 26 U.S.C. §7482(a)(1).

STATUTORY PROVISIONS INVOLVED

Unless otherwise indicated, section references herein are to the Internal Revenue Code (26 U.S.C.) in effect for the periods in issue. Section 511(a)(1) (App. 57a) generally imposes a tax on the unrelated business taxable income of tax exempt organizations. Section 512(a)(1) (App. 58a) generally provides that "unrelated business taxable income" means the gross income derived by any organization from any unrelated trade or business regularly carried on by it, less applicable deductions. Section 513(a) (App. 58a) generally provides that "unrelated trade or business" means any trade or business the conduct of which is not substantially related to the organization's exempt purpose, aside from the general need of such organization for income

or funds. Section 513(c) (App. 59a) effectively provides that a trade or business, such as advertising, may be separated, for the purpose of the unrelated business income tax, from a larger aggregate of activities of a tax exempt organization.

STATEMENT OF THE CASE

This case concerns the imposition of tax on income of a tax exempt organization attributable to activities which are unrelated to its exempt purpose. Such income is taxable only if it is derived from a "trade or business" which is "regularly carried on." In addition, the power of the U. S. Tax Court to reform instruments, a power held only by courts of general equitable jurisdiction, is questioned.

The Association is a labor organization exempt from taxation under Section 501(c)(5). It engaged publishers unrelated to the Association (collectively, Publisher) to publish a yearbook during the tax periods in issue. Their agreement was embodied in a 1982 writing which was twice revised (Agreements). The Publisher was a professional fund raiser under the Massachusetts Charitable Solicitation Act. The Publisher provided telephone solicitors who called businesses throughout the Commonwealth of Massachusetts on behalf of the Association and the Association provided a trooper who monitored the propriety of the solicitation.

Upon securing a pledge, a telephone solicitor identified the business on an envelope and sent it by courier to the business, which would deliver a check to the courier, who then returned the check to the solicitation office. The Association, Publisher and solicitors were entitled to varying percentages of gross weekly receipts and any amount left after payment of operating expenses belonged to the Association. The Agreements provided that the Publisher

was an independent contractor and not the Association's agent.

The Publisher laid out and published once annually over 5,000 copies of the Association's yearbook, called The Constabulary. The Constabulary contained articles about the Association, its members and law enforcement generally which were edited by members of the Association. The remainder of The Constabulary consisted of displays and listings identifying contributing businesses.

The content of over 90% of the displays was created by members of the Publisher's staff without input from businesses. None these displays were submitted to businesses for approval prior to publication. Business listings consisted of two or three lines which named the business and specified its city or town and telephone number. Most listings did not contain street addresses and in one year contained no telephone numbers.

Each year approximately 300 to 400 copies of The Constabulary were distributed to attendees of an annual picnic and sports day and approximately 1,000 copies were hand carried to trooper barracks. The remaining copies were distributed as part of the subsequent year's solicitation to prove to contributors that it was the Association's solicitation. The Constabulary was never sold to anyone for a charge.

On April 22, 1993, the Government issued a deficiency notice proposing the assessment of over $1.3 million of unrelated business income tax. The notice claimed the Association had regularly carried on an advertising business, which was not substantially related to the Association's exempt purpose. The Association petitioned the U.S. Tax Court invoking its jurisdiction under to Section 6213(a) for a redetermination of the deficiency, seeking a ruling that the displays and listings were not advertising or,

if they were, the Association had not regularly carried on an advertising business.

The case was tried in Boston, Massachusetts on October 28 and November 2, 1994. The Association introduced expert testimony as to the extent the displays and listings constituted advertising. The expert had conducted a systematic analysis of The Constabulary which examined The Constabulary's displays for information having any persuasive effect. She also tested listings for category and word comparison with a NYNEX yellow pages business to business directory. Her testimony was that approximately 16% of the displays, 3% of the listings and 10% of them combined constituted advertising. The remaining displays and listings were not advertising because they lacked the requisite informative content.

The Government's witnesses included representatives of businesses called by the telephone solicitors, including John Hancock Insurance Company and Ocean Spray Cranberries, Inc. None of them knew anything about the distribution of The Constabulary and one, representing Sigarms, a gun manufacturer, testified on direct examination that the payment made to the Association was a donation to support the Association and not advertising.

In its post trial brief the Association argued, *inter alia*, that a consent to extend the statute of limitations for assessment of the tax for certain periods was not effective. The Association and the Government by their representatives, had executed a form provided by the Government (Form 872) which stated that the parties agreed that the amount of any Federal Income Tax "due on any returns made by or for" the Association for specified periods may be assessed at any time on or before April 30, 1993. The only returns filed by the Association for these periods were informational

returns, known as Form 990, on which no tax was or could have been due.

The Tax Court decided the Association had engaged in the business of selling advertising. Further, it determined that such business had been "regularly carried on." In doing so, it distinguished *Suffolk County Patrolmen's Benevolent Association v. Commissioner*, 77 T.C. 1314 (1981) on the grounds that it was decided before *United States v. American College of Physicians*, 475 U.S. 834 (1986). App. 50a. It also distinguished *National Collegiate Athletic Association v. Commissioner of Internal Revenue*, 914 F.2d 1417 (10th Cir. 1991), because the facts in *NCAA* fit within an example given in the Treasury Department Regulations which govern the "regularly carried on" determination and, the Tax Court decided, that example did not apply in this case. App. 51a-50a.

The Tax Court also found the consent to extend the period of limitations was ambiguous. Thus, it could be construed to refer to returns which the Tax Court ruled the Association was deemed to have filed. App. 37a-38a.

Nonetheless, the Tax Court waived imposition of over $700,000 of penalties (not including additions to tax under Section 6653 for 50% of the interest on the deficiency) because the case presented a "close and complex question of law." App. 53a.

The Court of Appeals for the First Circuit affirmed the Tax Court. It discussed the principles articulated by the regulations regarding a "regularly carried on" business. However, like the Tax Court, it declined to analyze the facts in light of those principles. Rather, it resorted to the Tax Court's reasoning that the Association's activities did not conform to the example given by the regulations.

ARGUMENT FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION OF COURT OF APPEALS IN THIS CASE AND THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IN *NATIONAL COLLEGIATE ATHLETIC ASSOCIATION V. COMMISSIONER OF INTERNAL REVENUE*, 914 F.2D 1417 (10TH CIR. 1991) AND THEREBY PROVIDE GUIDANCE REGARDING THE CONTOURS OF A "REGULARLY CARRIED ON" BUSINESS.

The Senate Finance Committee that considered the enactment of the unrelated business income tax stated, "[T]he problem at which the tax on unrelated business income is directed is primarily unfair competition." S. Rep. No. 2375, 81st Cong., 2d Sess, reprinted in 1950-2 C.B. 483, 504. Treas. Regs. §1.513-1(b) states "the primary objective of adoption of the unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain tax exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete. App. 65a.

Unrelated business income depends on three elements. There must be (i) a trade or business from which income is derived which is, (ii) "regularly carried on" and which is, (iii) not substantially related to the tax exempt purpose of the tax exempt organization. Section 512(a), Section 513(a), App. 58a.

A trade or business includes any activity carried on for the production of income from the sale of goods or the performance of services. Section 513(c). App. 59a. An

activity will be treated as a trade or business even if it is conducted in conjunction with other clearly tax exempt activities. *Id.* The soliciting, selling and publishing of commercial advertising, though appearing in a tax exempt organization's periodical, is deemed to be a trade or business. Treas. Reg. §1.513-1(b). App. 65a. *United States v. American College of Physicians*, 475 U.S. 834, 839-840.

Treas. Regs. §1.513-1(c)(1) establishes the standard for determining when a business is "regularly carried on." A. 65a-68a. It provides:

> In determining whether trade or business from which a particular amount of gross income derives is "regularly carried on," within the meaning of section 512, regard must be had to the frequency and continuity with which the activities productive of the income are conducted and the manner in which they are pursued. This requirement must be applied in light of the purpose of the unrelated business income tax to place exempt organization business activities upon the same tax basis as the nonexempt business endeavors with which they compete. Hence, for example, specific business activities of an exempt organization will ordinarily be deemed to be "regularly carried on" if they manifest a frequency and continuity, and are pursued in a manner, generally similar to comparable commercial activities of nonexempt organizations.

The Court of Appeals for the Tenth Circuit interpreted this regulation in *National Collegiate Athletic*

Association v. Commissioner of Internal Revenue, 914 F.2d 1417. National Collegiate Athletic Association (NCAA) is a organization exempt from taxation under section 501(c)(3). It annually presents a basketball tournament, now consisting of 63 games, which culminates in the "Final Four" games to decide national collegiate basketball supremacy. The NCAA sells a program for that tournament, which occurs at four regional sites before travelling the road to the Final Four. That program contains advertising. The question before the Court of Appeals for the Tenth Circuit was whether such advertising was a regularly carried on business.

In making its decision in *NCAA*, the Tenth Circuit Court of Appeals deliberately stepped its way through Treas. Reg. §1.513-1(c)(1), carefully adhering to the admonition to check its results against the primary objective of the unrelated business income tax, which is to eliminate unfair competition between tax exempt and taxable entities. The Court of Appeals for the Tenth Circuit found no reference in the regulations to time spent in preparation of the income producing activity. Thus, it determined that the temporal standard articulated by the regulations, i.e., the standard that tests the frequency and continuity of the business activity, is to be applied to the time frame in which the publication of the advertising occurs. *National Collegiate Athletic Association v. Commissioner of Internal Revenue,* 914 F.2d 1417 at 1422-1423. In doing so it relied upon the reasoning in *Suffolk County Patrolmen's Benevolent Association, Inc. v. Commissioner*, 77 T.C. 1314, in which the Tax Court determined that only the time frame during which advertising is published should be considered in making a "regularly carried on" determination, i.e., preparation time is to be disregarded. *Id.* at 1323.

Further, the Court of Appeals for the Tenth Circuit confirmed its result by testing the publication of advertising

against the behavioral standard, i.e., that standard that measures whether advertising is pursued in a manner, generally similar to commercial advertising of nonexempt organizations. *National Collegiate Athletic Association v. Commissioner of Internal Revenue*, 914 F.2d 1417 at 1424-1426.

The Court of Appeals for the First Circuit split markedly with the Court of Appeals for the Tenth Circuit. The First Circuit Court of Appeals determined that the time spent soliciting and selling advertising was relevant to a "regularly carried on" determination. However, it dismissed in a footnote the requirement that publishing the advertising also be "regularly carried on." There it stated, " . . . there is no requirement that each task within the scope of the business must be carried on regularly". App. 15a. The Tenth Circuit Court of Appeals found this position to be contrary to the regulations and existing case law. *National Collegiate Athletic Association v. Commissioner of Internal Revenue*, 914 F.2d 1417, 1422.

The Court of Appeals for the Tenth Circuit in effect ruled that soliciting and selling commercial advertising, even if conducted for a substantial portion of a year, are not sufficient to draw advertising into the "regularly carried on" basket, if publication of the advertising occurs but once a year. In reaching the opposite conclusion the Court of Appeals for the First Circuit based its decision, in part, on the absence of a connection between the putative advertising and an event which the regulations illustrate by way of an example. App. 14a-15a.

Treas. Regs. §1.513-1(c)(2)(ii) states:

> "For example, the publication of advertising in programs for sports events or music or drama performances will not ordinarily be deemed to be the regular carrying on of business. Treas. Reg. §1.513-1(c)(2)(ii). App. 66a-67a.

Because the Association's putative advertising was not linked to a sports event or music or drama performance the First Circuit Court of Appeals did not adopt the methodology of *NCAA*.

The Tenth Circuit Court of Appeals relied on the temporal and behavioral standards set forth in Treas. Regs. §1.513-1(c) and decided the proper time frame for determining regularity is that in which advertising is published. The First Circuit Court of Appeals relied on the Association's failure to fall within an example in the regulations and decided regularity depended upon the time spent soliciting and selling but the frequency of publication was not relevant.

United States v. American College of Physicians, 475 U.S. 834, points to a resolution of this conflict. The issue in that case was whether advertising published in The Annals of Internal Medicine by a tax exempt organization was substantially related to that organization's exempt purpose. The Government contended that an example in the regulations created a *per se* rule for taxing journal advertising income and that Congress adopted that rule by enacting Section 513(c), App. 59a, two years following promulgation of the regulation.

This Court noted that the regulations expressed a standard which depended on the facts of each case. *United*

States v. American College of Physicians, 475 U.S. 834, 842-843. Specifically, activities will be substantially related to an organization's exempt purpose if they "contribute importantly to the accomplishment" of that purpose. This Court stated:

> [E]xample 7 need not be interpreted as being inconsistent with that general rule. Attributing to the term "example" its ordinary meaning, we believe that Example 7 is best construed as an illustration of one possible application, under given circumstances, of the regulatory standard for determining substantial relation. *Id.* at 843.

So it is in this case. The example is not the rule. The rule is embodied in the principles and determination process prescribed by the regulations. One such principle measures regularity in a temporal sense and another tests regularity by looking at the manner in which the activity is pursued. These regulations, all but ignored by the Court of Appeals for the First Circuit, by reason of their longevity, carry the force of law. *Helvering v. Winmill*, 305 U.S. 79, 83 (1938).

Following the reasoning of the Court of Appeals for the First Circuit puts even high school and college yearbooks at risk of producing taxable income. Income of such yearbooks is protected from the unrelated business income tax if student soliciting, selling and publishing advertising is substantially related to the educational institution's exempt purpose. However, to be substantially related such activity must contribute importantly to the educational program through the training of students under the supervision and instruction of the school or college. Treas. Regs. §1.513-

1(d)(1), (2) and (4) Ex.5. App. 69a-71a. If training or adequate supervision or instruction of students is absent, taxable income will result unless the soliciting, selling and publishing is not "regularly carried on." In such circumstances, the soliciting and selling of advertising over the course of a school year would produce unrelated business income, according to the reasoning of the First Circuit Court of Appeals, despite the publication of a yearbook only once each year.

The methodical approach of the *NCAA* court effectively embraces the approach of this Court in *American College of Physicians*. The Court of Appeals for the Tenth Circuit illuminated the activity in question with the light of the general principles of Treas. Reg. §1.513-1(c). Thus enlightened, the Court decided that the sale of advertising in the NCAA program had not been regularly carried on and, moreover, that its decision conformed with the objective of the unrelated business income tax to prevent unfair competition. The Court of Appeals for the Tenth Circuit was correct in its approach to this question and it should be adopted as a national standard.

II. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' DECISION THAT THE CONSTABULARY CONTAINED ADVERTISING BECAUSE IT FOLLOWS A GOVERNMENT REGULATION THAT INCONSISTENTLY FAVORS CERTAIN TAX EXEMPT ORGANIZATIONS OVER OTHERS AND THEREFORE DOES NOT IMPLEMENT THE LAW IN A REASONABLE MANNER.

Advertising is not related to the exempt purpose of most tax exempt entities. However, advertising is not self defining or intuitively understood.

In its current administration of the unrelated business income tax, the Government generally defines advertising to be any message or other programming material which is published in exchange for any remuneration, and which promotes or markets any company, service, facility or product. Prop. Regs. §1.513-4(b). App. 72a. However, advertising does not include acknowledgements which are mere recognition of payments made by sponsors of tax exempt entities. Prop. Regs. §1.513-4(b)(1). App. 72a.

Acknowledgements may include, provided the effect is identification of the sponsor rather than promotion of its products or services: (i) logos and slogans that do not contain comparative or qualitative descriptions of the sponsor's products, services, facilities or company; (ii) sponsor locations and telephone numbers; (iii) value neutral descriptions of a sponsor's product line or services; and (iv) a sponsor's brand names and product and service listings. Prop. Regs. §1.513-4(c)(1). App. 73a.

These rules, according to the proposed regulations, do not apply to the sale of advertising in exempt organization

periodicals, although no reason is given for so discriminating. Prop. Regs. §1.513-4(a)

The proposed regulations have, in substance, been enacted into law by Section 965(a) of P. L. 105-34 [The Taxpayer Relief Act of 1997], which inserted new subsection (i) in Section 513, effective for payments solicited or received after December 31, 1997. App. 62a. However, the proposed regulations interpret the law as it was before this enactment and the views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any significance. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

There is little doubt that Congress may by legislation treat similarly situated taxpayers differently. See, Bitker, B. and Lokken, L., Federal Taxation of Income Estates and Gifts, Warren, Gorham & Lamont, 2nd ed. (1989), ¶1.2.5. However, the Association has consistently maintained that the Government had no statutory authority to accord favorable treatment to a narrow class of tax exempt organizations to the exclusion others for the tax periods here at issue. The codification of the proposed regulations supports this position.

Congress has delegated to the Secretary of Treasury and his delegates the task of prescribing all needful rules and regulations for the enforcement of the Internal Revenue Code. *United States v. Correll*, 389 U.S. 299, 307 (1967). However, these rules and regulations must carry out the law in some reasonable manner. *See, United States v. Cartwright*, 411 U.S. 546, 550 (1973). Whether a regulation harmonizes with the plain language of the statute, its origin, and its purpose must be determined. *National Muffler Dealers Association, Inc. v. United States* 440 U.S. 472, 477. An important aspect of that determination is the

regulation's consistency. *Id.* The clearly inconsistent treatment of different tax exempt organizations for no reason under the proposed regulations facially demonstrates that these rules do not carry out the law in some reasonable manner. *United States v. Cartwright*, 411 U.S. 546, 550 (1973).

A portion of Treas. Regs. §1.513-1, finally promulgated in December, 1967, was enacted into law by P.L. 91-172 (Tax Reform Act of 1969). Prior to such enactment, commentary on these regulations was harsh, particularly as to their direction to separate or "fragment" activities of soliciting, selling and publishing commercial advertising from the publishing of editorial matter in journals published by tax exempt organizations. See, *United States v. American College of Physicians*, 475 U.S. 834, 841, n. 3. (1986). The idea of fragmenting activities into taxable businesses and tax exempt activities ran counter to the well accepted concept of a trade or business being a unitary activity. Indeed, two circuit courts of appeal determined that the Treas. Regs. §1.513-1(b) direction to "fragment" publishing from tax exempt activities exceeded the authority granted by the law. See, *American College of Physicians v. United States*, 209 Ct.Cl. 23, 29, 530 F.2d 930, 933 (1976); *Massachusetts Medical Society v. United States*, 514 F.2d 153, 154 (1st Cir. 1975).

The documentary evidence and trial testimony in this case amply demonstrate that the displays, and especially the listings, in The Constabulary are isomorphic with the logos, slogans, brand names and value neutral descriptions which the proposed regulations describe as acknowledgements of sponsor generosity and not advertising.

By reversing the decision of the Court of Appeals and striking down the proposed regulations, this Court will add clarity to the boundaries of interpretation beyond which the

Secretary of Treasury and his delegate may not proceed in the fair and even handed administration of the tax laws.

III. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' FINDING OF AMBIGUITY IN THE CONSENT TO EXTEND THE STATUTE OF LIMITATIONS, DECIDE THAT THE TAX COURT IS NOT EMPOWERED TO REFORM INSTRUMENTS AND ORDER THAT TAX MAY NOT BE ASSESSED FOR PERIODS COVERED BY THE CONSENT.

Section 6501(a) (App. 60a) generally provides that the Government must assess the amount of any tax within three years after a return is filed. However, a taxpayer and the Government may consent in writing to an assessment after such time. Section 6501(c)(4). App. 61a. Contract principles govern the validity and interpretation of such consent because both the law and the regulations require the parties to execute a written agreement as to the extension. *Id.*, Treas. Regs. §301.6501(d), App. 71a; *Woods v. Commissioner*, 92 T.C. 776, 780 (1989).

The good faith filing of the informational returns (Forms 990) by the Association commenced the running of the period of limitations for certain periods. Section 6501(g)(2), App. 61a.; *California Thoroughbred Breeders Ass'n v. Commissioner*, 47 T.C. 335, 339 (1966); Rev. Rul. 69-247, 1969-2 C.B. 303 (acquiescence in result). These were the only returns filed by the Association for the such periods. The Forms 990 show income, expense, and balance sheet of the Association and ask various questions but show no tax due.

The Association and the Government executed a Government form (Form 872) which stated that the parties

agreed that the amount of any Federal Income Tax "due on any returns made by or for" the Association for specified periods may be assessed at any time on or before April 30, 1993. The Tax Court decided that the Form 872 effectively extended the period of limitations by construing the language "returns made by or for" to mean "returns made or deemed to have been made by or for", i.e., returns deemed made under Section §6501(g)(2). App. 61a. Further, it decided that even if Form 872 could not be construed to include a deemed file return, the Tax Court could reform it to conform with the intent of the parties. App. 37a., n. 4.

The Court of Appeals affirmed the Tax Court but its reasoning begged the question. It first asked whether the consent was ambiguous, a clear question of law. *ITT Corp. v. LTX Corp.*, 926 F.2d 1258, 1261 (1st Cir. 1991). However, in answering this question, it did not examined the language of the consent. Rather, it looked to the construction placed on that language by the Association in the context of the Court's supposition of facts extraneous to the consent.

The Court of Appeals took into account that the only "returns made" were information returns on which no tax could conceivably be due, and that the signatories to the Form 872 knew as much. It concluded the language must be ambiguous because the Association's construction was implausible. App. 5a-6a. In fact, the Association representative gave no thought to whether tax could be due on the returns when executing the Form 872 and it is likely the Government representative did the same.

A written consent to extend the limitations period is not ambiguous when it is clear on its face and its meaning is certain, even though it misstates the intent of both parties. *Woods v. Commissioner*, 92 T.C. 776, 781. The application of clear language, which misstates the intent of both parties,

to the circumstances of any case may well produce an implausible result. That is precisely why the Tax Court would have had to reform the Form 872 to give it effect. However, it cannot do this because it does not have the power.

The Tax Court has reformed a Form 872 or similar form on at least three occasions. In *Woods*, the form referred to S corporation adjustments relating to a company known as "Solar Environments, Inc. EIN: 43-1156200". The actual name of company was "Solar Equipment, Inc." and its employer identification number (EIN) was "43-1156196".

In *Kelley v. Commissioner*, 1990 T.C. Memo 1990-158, aff'd 45 F.3d 348 (9th Cir. 1995) the Tax Court reformed two forms that purported to extend the period for assessment for 1979 when 1978 and 1980 were intended. "1979" was printed in the body of each instrument but "For the period ended December 31, 1978," was handwritten at the top of one form and "For the period ended December 31, 1980." was handwritten at the top of the other.

In *Buchine v. Commissioner*, T.C. Memo 1992-36, aff'd 20 F.3d 173 (5th Cir. 1994) the applicable form referred to tax year 1984 when 1981 was intended. The Tax Court reformed the instrument, in part, because when the taxpayer executed the form he had not filed a 1984 return.

According to the reasoning of the First Circuit Court of Appeals, in each of these cases the Tax Court could have determined the reference to be ambiguous because to do otherwise would have produced an implausible result. That is, in *Woods*, the taxpayers had no relationship with a company known as Solar Environments, Inc. In *Kelley*, the ambiguity appeared on the face of the forms (1979 being printed and either 1978 or 1980 being handwritten at the top) and in *Buchine*, the 1984 return had not even been filed. Thus considered, the references in all these cases would have

produced an implausible result. Such ambiguity would have left the Tax Court at liberty to construe the language to give effect to the intention of the parties. However, the Tax Court chose to reform the instruments, exercising a power reserved to courts possessing the powers of an equity court.

The Tax Court, soon after its establishment as the Board of Tax Appeals in 1924, an agency of the executive branch, declared it was without the power of court of equity and did not have the power to reform instruments. *Constitution Publishing v. Commissioner*, 22 B.T.A. 426, 428 (1931). The Board's name was changed to the U. S. Tax Court in 1942 but it remained an independent agency in the Executive Branch, 26 U.S.C. §1100 (1952 ed.). *Freytag v. Commissioner*, 501 U.S. 868, 912 (1991). In 1969 it was established as a court under Article I of the U.S. Constitution. Establishment under Article I gives a court the power to "adjudicate matters". It does not, however, empowered it to determine matters which are "inherently judicial." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1981). *Freytag v. Commissioner*, 501 U.S. 868, 909. (Scalia, J., concurring in part and concurring in the judgement, with whom O'Connor, J., Kennedy, J. and Souter, J. joined).

American courts do not derive their equitable powers as a part of the entire common law system of jurisprudence which this country inherited from England. Rather, their equitable jurisdiction is wholly a creature of statute and is measured by the extent and limitations of statutory authority. 1 J. Pomeroy, *Equity Jurisprudence*, §282, p. 632 (5th ed. 1941). In some states the statutory delegation of power is broad and comprehensive and in others it is special in nature and limited in extent. *Id.* at §283, p. 633.

The United States falls into that class in which the constitution implicitly confers a general equity jurisdiction

substantially the same as that possessed by the English court of chancery, except as modified or limited by legislation. *Id.* at §285, p. 636, 637. Judicial Code, [March 3, 1911] chap. 231, §24, 36 Stat. at L. 1087, 1091, provides that district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, ..." *Id.* at 637, n. 16.

The Congress has not granted to the Tax Court jurisdiction to decide suits in equity. It has granted the Tax Court, in Section 6213, App. a., jurisdiction to redetermine deficiencies. Moreover, it gave the Tax Court the power to restrain by injunction, an exclusively equitable remedy, 1 J. Pomeroy, *Equity Jurisprudence*, at §138, p. 190, any assessment, proceeding for collection of tax or levy until the expiration of the period during which a deficiency notice may issue or until the decision of the Tax Court becomes final. The grant of this limited equitable power implies the exclusion of any other. This restricted grant of equitable power is consistent with and flows from Pomeroy's proposition that equitable jurisdiction is wholly a creature of statute and that some statutory grants of jurisdiction are special in nature and limited in extent. 1 J. Pomeroy, *Equity Jurisprudence*, at §283, p. 633.

The courts of appeals which affirmed the Tax Court's power of reformation either adopted the Tax Court's characterization of reformation as the mere application "equitable principles" *Buchine v. Commissioner*, 20 F.3d 173, at 178 or a limited and permitted exercise of "equitable power" in the process of redetermining a deficiency. *Kelley v. Commissioner*, 45 F.3d 348 at 352 . However, this Court has twice held that the Tax Court or its predecessor is a court of limited jurisdiction and lacks general equitable powers. *Commissioner v. Gooch Milling & Elevator Co.*,

320 U.S. 418 (1943); *Commissioner v. McCoy*, 484 U.S. 3 (1987).

Few would question the competency of the Tax Court judges to exercise some or all of the powers of a court of general equitable jurisdiction. This Court has stated that "[T]he Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, ..." *Freytag v. Commissioner*, 508 U.S. 868, 891. However, if its power generally to reform instruments is confirmed or left unchecked substantial confusion will result.

Judge Chabot asked rhetorically in his dissent in *Woods* whether the Tax Court would have the power to reform an instrument where the reformation would have only tax consequences and not affect the non-tax property rights of the parties. Extrapolating upon that concern, it is useful to inquire as to the effect of an instrument that is given one (reformed) meaning by the Tax Court and another (unreformed) by a state court.

For example, a marital deduction may be secured by a decedent's estate only if certain gifts in trust to a surviving spouse qualify. One element of such qualification is that the spouse have the right to income for life. *See, e.g.*, Section 2056(b)(7). A gift in trust might mistakenly state, because of a scrivener's error, that the trustee "may" pay income annually to the spouse for life. Upon sufficient evidence of the donor's intent, the Tax Court could decide that the word "shall" was intended and on that basis reform the trust, thus fulfilling the statutory requirement of a mandatory income interest for life. The highest court of the state having jurisdiction over the trust could later decide that the trust was not susceptible to reform. A marital deduction would have been allowed by the Tax Court even though as a matter state law income distributions were purely discretionary.

The matter would not end there. On the death of the surviving spouse, the property from which the income may have been earned may not be included in the surviving spouse's gross estate because the surviving spouse did not have (according to the state court decision) a "qualifying income interest for life." Section 2044. See, *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

This illustrates why the decision to reform instruments generally should be left to state courts having jurisdiction to exercise the powers of equity as well as to decide the rights of the parties. Requiring taxpayers to seek reformation in state courts not only precludes inconsistent treatment between the Tax Court and state courts but also ensures uniform treatment of tax issues upon which such instruments depend.

CONCLUSION

On the basis of the foregoing, the Petitioner respectfully requests that a writ of certiorari issue to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

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November 18, 1997

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STATE POLICE ASSOCIATION OF MASSACHUSETTS, Petitioner, Appellant,	)	
v.	)	No. 97-1319
COMMISSIONER OF INTERNAL REVENUE, Respondent, Appellee.	)	

APPEAL FROM THE UNITED STATES TAX COURT
[Hon. Thomas B. Wells, Judge]

Before Selya and Lynch, Circuit Judges, and Pollak,* Senior District Judge.

Alfred J. O' Donovan, with whom Michelle H. Blauner and Shapiro Haber & Urmy were on brief, for appellant.

Teresa T. Milton, Attorney, Tax Division, U.S. Dep't of Justice, with whom Loretta C. Argrett, Assistant Attorney General, and Kenneth L. Greene, Attorney, Tax Division, were on brief, for appellee.

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* Of the Eastern District of Pennsylvania, sitting by designation.

SELYA, Circuit Judge. In this case, the Commissioner of the Internal Revenue Service (the Commissioner) issued a deficiency notice to the State Police Association of Massachusetts (the Association) for income taxes allegedly due but unpaid. When the Association protested, the Tax Court sided with the Commissioner. *See State Police Ass'n of Mass. v. Commissioner*, 72 T.C.M. (CCH) 582 (1996) (Tax Ct. Op.). The Association appeals, contending that the Tax Court erred both in finding that the deficiency assessment was timely and in holding that certain of the Association's activities gave rise to liability for unrelated business income tax. We affirm.

I. BACKGROUND

The Association is a labor organization, and, as such, is exempt from income taxes under 26 U.S.C. § 501(c)(5) (1994).[1] The purpose of the organization is to represent its members in bargaining over the terms and conditions of their employment and to promote a fraternal spirit among members. Virtually all the troopers who are eligible to join the Association do so.

During the years at issue, the Association published an annual yearbook, known as The Constabulary. The yearbook consisted of photographs, articles, display advertisements, and a business directory. We describe *infra* the sales effort (which the Association in more salubrious times called the "earnings program") and the mechanics of publication and distribution. It is enough for now to say that

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[1] From this point forward, we will refer to the applicable provisions of the Tax Code, as they appeared on the date(s) in question, by using the preface "IRC." To illustrate, 26 U.S.C. § 501(c)(5) will be cited as IRC § 501(c)(5), and so on and so forth.

the earnings program proved to be aptly named: gross receipts related to the publication of The Constabulary for the years at issue totalled $8,788,211. Of this amount, the Association retained somewhat over 40% (the precise percentage varied from year to year, and is of no consequence here). The Association paid no tax on the income.

It is said that all good things come to an end. Federal law requires that an otherwise tax-exempt organization must pay federal income tax on income derived from business ventures which are not substantially related to its tax-exempt purpose(s). *See* IRC § 511. After due investigation, the Commissioner concluded that the Association had violated this stricture because the sale of advertising in The Constabulary yielded taxable income. Acting on this conclusion, the Commissioner issued a deficiency notice seeking $1,352,433 in taxes due for the tax years ended April 30, 1986 through April 30, 1989, the three months ended July 31, 1989, and the tax years ended July 31, 1990 and 1991, along with additions to tax and penalties totalling $711,075.

Displeased by this turn of events, the Association brought suit in the Tax Court under IRC § 6213(a) to obtain a redetermination of the taxes allegedly due. It claimed that, for certain tax years, the notice of deficiency had been issued beyond the applicable limitation period; and that, on a broader plane, the activity cited by the Commissioner the solicitation, sale, and publication of display ads and listings in The Constabulary did not constitute an unrelated trade or business regularly carried on, and that, therefore, the income derived from that activity was exempt from tax. The Tax Court rejected both of these theses and sustained the Commissioner's determination of the existence and extent of the deficiency (although it eliminated the additions to tax and

the penalties). *See* Tax Ct. Op. at 589, 594. This appeal ensued.

II. THE PUTATIVE TIME BAR

The Association claims that the statute of limitations bars the collection of taxes as to some or all of the affected periods. The relevant facts are not in dispute. On August 3, 1992, the Association and the Commissioner, through their authorized representatives, executed a form entitled "Consent to Extend the Time to Assess Tax" (the Form). The Form, a copy of which is reprinted in the appendix, permitted the Commissioner to assess income tax on or before April 30, 1993, for the contested periods through July 31, 1989. The Commissioner assessed the taxes allegedly due for these periods by issuing a deficiency notice on April 22, 1993. The applicable limitation period is three years. *See* IRC § 6501(a). If the Form sufficed to extend the limitation period, then the deficiency notice was timely as to all the tax years at issue; if not, the Commissioner's claim for certain periods is probably time-barred.

The Association advances a purely linguistic argument on this point. It notes that the text of the Form provides for an extension of the limitation period solely with respect to tax due on "any return(s) made" by the Association during the periods in question. The only returns so made were information returns, on Form 990, entitled "Return of Organization Exempt from Income Tax." By definition, no tax could possibly be due on an information return. Taking this literal view, the Association contends that the Form did not extend the limitation period at all.

The Tax Court refused to swallow this slippery syllogism. It impliedly found the language of the Form ambiguous and construed it as broad enough to include not

only taxes due on returns made but also taxes due on returns deemed to be made. *See* Tax Ct. Op. at 589. Ascertaining the ambiguity *vel non* of a writing requires a court to ask and answer a question of law, and, therefore, we review this conclusion *de novo*. *See* IRC 7482(c)(1); *see also RCI Northeast Servs. Div. v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir. 1987).

The Tax Court's rendition withstands scrutiny. Tax forms are rarely models of syntactical clarity, and the Form signed by the parties is no exception. The Tax Court read the phrase "return(s) made" as encompassing returns deemed to be made. This construction strikes us as reasonable.

Words must be read in context. Though a plain vanilla reading of the Form would support an inference that the parties wished to extend the limitation period for assessing taxes due on actual returns filed for the applicable periods, the context casts a different light on the phrase "return(s) made." When one takes into account that the only "returns made" were information returns on which no tax could conceivably be due, and that the signatories to the Form knew as much, the ambiguity of the phrase becomes apparent.

Our thinking runs along the following lines. It would be nonsensical to extend the limitation period for assessment of taxes due on a return on which, by operation of law, no tax conceivably could be due. The law, in turn, should be reluctant to insist that courts construe a document in a way that leads to an absurd or nonsensical result. Indeed, the maxim *ut res magis valeat quam pereat* teaches that a written instrument ordinarily should be given a meaning that will make it legally functional rather than a meaning which will render it legally dysfunctional. *See* 3 Arthur Linton Corbin, *Corbin on Contracts* § 532 (1960); *see also Blackie v. Maine*, 75 F.3d 716, 722 (1st Cir. 1996). Thus, the very

implausibility of the Association's proposed construction suggests that the phrase "return[s] made" must have some other meaning.

This conclusion is fortified by the wonted operation of the relevant provisions of the Internal Revenue Code. Specifically, a return relative to the unrelated business taxable income of a normally tax-exempt organization (a so-called "990-T" return) is deemed made, for purposes of starting the running of the limitation period, when the information return (a so-called "990" return) is in fact made. *See California Thoroughbred Breeders Ass'n v. Commissioner*, 47 T.C. 335, 338 (1966) (construing IRC § 501(g)(2)). Without this rule deeming the Association's 990 return to be a 990-T return, the statute of limitations that the Association seeks to invoke would, presumably, not yet have begun to run. The Association thus seeks to link the two forms for the purposes of starting the limitations period, but would have us decouple the forms in reviewing its agreement to extend that period. Perhaps more important, reading the Form against the backdrop of the *California Thoroughbred Breeders* rule suggests another (broader) meaning for the phrase "return(s) made" a meaning which extends to returns deemed made and thus highlights the ambiguity of the Form.

That ends the matter. The presence of an ambiguity permits a reviewing court to examine extrinsic evidence in an effort to clarify the intent of the parties. *See Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 179 (1st Cir. 1995); *RCI Northeast*, 822 F.2d at 202. Here, the extrinsic evidence is telling: the Association's reading of the Form contradicts what even the Association admits was the parties' mutual intention to extend the limitation period as to any unrelated business income tax that might be due for the affected periods.

We need not linger.[2] We resolve contractual ambiguity in favor of effectiveness, accept the discerned intent of the parties, endorse the Tax Court's interpretation of the phrase "return[s] made," and hold that the Form extended the limitation period as to the assessment of unrelated business income tax. The notice of deficiency was, therefore, timely as to all the contested tax years.

III. THE MERITS

The gravamen of the Commissioner's case is the charge that the activity undertaken in connection with publication of The Constabulary generated unrelated business taxable income. The allegation that an activity engaged in by a tax-exempt organization gives rise to unrelated business taxable income requires proof of three components. The Commissioner must demonstrate (1) that the activity comprises a trade or business, (2) which is regularly carried on, and (3) which is not substantially related to the organization's tax-exempt purpose. *See United States v. American Bar Endowment*, 477 U.S. 105, 110 (1986); *see also* IRC § 513(a).

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[2] The court below suggested that, if it were unable to construe the language in the Form to give effect to the parties' discerned intention, it could reach the same result by reforming the instrument. *See* Tax Ct. Op. at 589 n.4. In general, reformation is available when a writing is clear on its face (i.e., unambiguous) but nonetheless misstates the parties' intent. *See, e.g., United States v. Lumbermens Mut. Cas. Co.*, 917 F.2d 654, 658 (1st Cir. 1990); *Rocanville Corp. v. Natural Gas Pipeline Co.*, 823 F.2d 92, 94 (5th Cir. 1987); *see also* Restatement (Second) of Contracts § 155 (1979). The doctrine can be applied in tax cases. *See, e.g., Woods v. Commissioner*, 92 T.C. 776, 782-83 (1989). However, because we uphold the Tax Court's implicit finding that the Form is ambiguous, we need not reach the reformation issue.

A.

At the gateway to this issue, the parties dispute the standard of review. The Association asserts that the Tax Court's findings that publication of The Constabulary involved a business regularly carried on[3] are subject to de novo review. The Commissioner maintains that these findings are entitled to greater deference.

Congress has directed the courts of appeals to use the same standards in reviewing Tax Court decisions that traditionally are used in appellate review of district court decisions in civil actions tried without a jury. *See* IRC § 7482(a). Consequently, we evaluate the Tax Court's findings of fact under the clearly erroneous standard. See *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *Manzoli v. Commissioner*, 904 F.2d 101, 103 (1st Cir. 1990); see also Fed. R. Civ. P. 52(a). This mode of review requires us to accept the Tax Court's credibility determinations and its findings about historical facts unless, after careful evaluation of the evidence, we are left with an abiding conviction that those determinations and findings are simply wrong. *See Reliance Steel Prods. Co. v. National Fire Ins. Co.*, 880 F.2d 575, 576 (1st Cir. 1989). Notwithstanding the clearly erroneous rule, however, the Tax Court's ultimate conclusions (e.g., whether the facts, as found, are legally sufficient to demonstrate that the Association engaged in a trade or business) are conclusions of law, and are therefore subject to de novo review.

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[3] The Association does not mount a challenge on the third prong of the tripartite test, instead conceding that if the activity amounts to a regularly conducted trade or business, it is, as the Tax Court found, not substantially related to the Association's tax-exempt purpose. *See* Tax Ct. Op. at 591.

On the merits, the Association advances two challenges: it asserts that the activities in question did not constitute a trade or business, and that in all events those activities were not conducted with the requisite regularity. We address these challenges sequentially.

B.

The operating paradigm permitted the Association to exercise significant control over the sales effort, the handling of the funds generated, and the publication of The Constabulary. Under this paradigm, the Association contracted with an outside firm (originally Brent-Wyatt East, and later R.H. McKnight Co.) to publish the yearbook and recruit telemarketers. These telemarketers were considered joint employees of the Association and the outside firm.[4] Groups of eight to twelve callers worked out of field offices selected by the outside firm with the Association's approval and solicited local and national businesses within geographic areas demarcated by the Association. In so doing, they utilized a canned solicitation format approved by the Association, introducing themselves as calling on behalf of the Association. Troopers monitored all solicitations to make certain that the sales staff did not trespass into forbidden terrain. The Association also retained the right to inspect, without prior notice, the field offices from which solicitations took place.

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[4] We describe the relationship as it existed through mid-1990, under contractual arrangements with Brent-Wyatt East. Although the contract signed with McKnight on June 20, 1990, contained some variations, the Tax Court supportably found that these changes were largely cosmetic and did not alter the essential character of the relationship. *See* Tax Ct Op. at 585.

Prospective customers were offered the opportunity to purchase display advertisements and listings. Displays ranged in size from one-sixth of a page to a full page, and, at the purchaser's option, could contain text, logos, slogans, borders, and blocking. The fee charged for a display advertisement or a directory listing varied in direct proportion to the size of the display or listing and to the number of editions in which it appeared.[5] The Constabulary was arranged so that displays were interspersed with editorial matter, and the publication contained a so-called "Index to Advertisers." Listings were arranged by type of product or service in a separate business directory section.

Payments for ads sold were made to the Association and the Association deposited the receipts in its account. It made weekly accountings retaining a stipulated percentage "off the top" for itself, paying set percentages of the gross receipts to the telemarketers and to the outside firm, defraying the costs associated with solicitation and publication and kept any excess.

The Association published The Constabulary annually. Association members acted as the editorial staff, writing and editing articles for the publication and approving the contents of the finished product. The Association distributed the yearbook free of charge at various state troopers' barracks, the Association's annual picnic (the "Police Chase"), and other occasions. Copies were sometimes sent to advertisers.

Based on this scenario, the Commissioner's theory is that the Association which from time to time called The Constabulary an "ad book" and which, in its contract with Brent-Wyatt East, referred to the latter's assignment as "marketing advertising" engaged in the business of selling

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[5] The Association produced five regional editions with common editorial material.

advertising. The Association counters that it did not engage in that business; in its view, the displays and listings were not advertising at all, but merely a means of identifying sponsors. The Tax Court rejected this contention, *see* Tax Ct. Op. at 590, and so do we.

Even a cursory glance at the yearbook, the pricing structure, and the terminology used by the Association belies the belated claim that the ads and listings were not "advertising" as that term is commonly understood. Nor is the Association's attempted recharacterization made any more palatable by its reliance on Proposed Treas. Reg. § 1.513-4, 58 Fed. Reg. 5690, 5690 (1993). The proposed regulation describes the permissible contents of acknowledgements of sponsorship payments; it allows value neutral descriptions of a sponsor's products or services, and logos or slogans "that are an established part of a sponsor's identity." *See id.* § 1.513-4(c). We need not decide, however, whether the materials in The Constabulary meet these exacting criteria; the proposed regulation, by its terms, does not apply to periodicals produced by tax-exempt organizations. *See id.* § 1.513-4(a).

Putting the proposed regulation to one side, the Commissioner's appraisal of The Constabulary's contents comports with common sense: the displays look like ads, the directory listings function as guides to products and services, and the Association itself, at least during the first four years of the undertaking, consistently referred to the displays and listings as ads rather than as acknowledgements. That appraisal also is supported by well-reasoned precedent.

Fraternal Order of Police, Etc. v. Commissioner, 87 T.C. 747 (1986), aff'd, 833 F.2d 717 (7th Cir. 1987) (FOP), which also involved the solicitation and sale of insertions in a publication sponsored by a tax-exempt policemen's organization, bears a strong resemblance to the case at bar.

The Tax Court found that the activity in question amounted to an unrelated business. 87 T.C. at 757. The Seventh Circuit affirmed this finding. 833 F.2d at 721-22. The similarities are striking. There, as here, the publication included display ads (using logos, slogans, and blocking), a directory section, and a message asking readers to patronize the businesses listed therein. *See id.* at 719-20. There, as here, the size of an insertion was directly proportionate to the price charged. *See id.* at 721. There, as here, the sponsoring organization, prior to the time the Commissioner came calling, characterized the disputed activity as advertising. *See id.*

Given these similarities, *FOP* is powerful authority for the Commissioner's position that the activity here in question comprises a separate, unrelated business. We consider *FOP* correctly decided, and we find unconvincing the Association's attempts to distinguish it.[6] Consequently, we hold that the Tax Court did not commit clear error in finding that the Association's solicitation, sale, and publication of displays and listings in The Constabulary constituted the business of advertising.

The Association's fallback position is its claim that the Commissioner erred in treating the outside firms (Brent-Wyatt East and McKnight, respectively) as agents of the Association (and, thus, in attributing these firms' activities to the Association). To bolster this claim, the Association stresses that the contract documents required

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[6] In striving to reach escape velocity from *FOP*'s precedential orbit, the Association relies heavily on its presentation of expert testimony at trial. But this testimony was discounted by the Tax Court because the expert was dismally uninformed. *See* Tax Ct. Op. at 589-90. That determination was well within the trier's purview. *See Seagate Tech., Inc. v. Commissioner*, 102 T.C. 149, 186 (1994).

these firms to operate as independent contractors. It follows, the Association says, that even if the cited activities constituted the business of advertising, the business belonged to the outside firms.

We are not persuaded. In the first place, an independent contractor can be an agent if, and to the extent that, the contractor acts for the benefit of another and under its control in a particular transaction. *See* Restatement (Second) of Agency §§ 2, 14N (1957). In the second place, the label which contracting parties place on their relationship is not decisive of their status vis-a-vis third parties. *See Board of Trade v. Hammond Elevator Co.*, 198 U.S. 424, 437 (1905). Either way, answering the question that the Association raises requires that we examine the substance of the contracting parties' relationship.

In this analysis, no single factor is dispositive. *See Labor Relations Div. of Constr. Indus. v. International Bhd. of Teamsters*, 29 F.3d 742, 748 (1st Cir. 1994). Rather, the nature of the relationship between the Association and the outside firms depends on a myriad of factors, including control over the manner and means of performing the work, the skill required, the method of payment, the duration of the relationship, and similar factors. *See, e.q., Saenger Org., Inc. v. Nationwide Ins. Licensing Assocs., Inc.*, ___ F.3d ___ , (1st Cir. 1997) [No. 96-2197, slip op. at 12]; *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 629-30 (1st Cir. 1996). The relevant factors here, taken as a whole, solidly support the Tax Court's determination that the outside firms acted as the Association's agents.

First and foremost, the manner in which the Association conducted its affairs undercuts its claim that it lacked the requisite degree of suasion over the outside firms' activities. The Association retained very tight control over the method and manner of solicitation, the ingredients of the

sales pitch, the identity of the solicitors, the financial aspects of the arrangement, the use of its name, the advertising formats, and the contents of the yearbook. We refer the reader who hungers for a blow-by-blow account to the details set out in the opinion below. *See* Tax Ct. Op. at 584-85. Without belaboring the point, it is enough to say that the record reveals an ample factual predicate for the finding that an agency relationship existed between the Association and the outside firms.

C.

The Association's final contention is that, even if its activities comprise a business attributable to it, that business was not carried on regularly. To buttress this contention, the Association makes two separate, but related, arguments. Its first asseveration rests on the decisions in *National Collegiate Athletic Ass'n v. Commissioner*, 914 F.2d 1417 (10th Cir. 1990) (*NCAA*), and *Suffolk County Patrolmen's Benevolent Ass'n v. Commissioner*, 77 T.C. 1314 (1981). These decisions are inapposite. In each instance, the advertising activity was tied to the program for a specific event. See *NCAA*, 914 F.2d at 1420 (collegiate basketball tournament); *Suffolk County*, 77 T.C. at 1316 (vaudeville show). Thus, resolution of those cases depended on Treas. Reg. § 1.513-l(c)(2)(ii), which specifically provides that "publication of advertising in programs for sports events or music or drama performances will not ordinarily be deemed to be the regular carrying on of business." That regulation is of no assistance here because the Tax Court found specially that the Association's publication of The Constabulary was not linked to the occurrence of a specific event, *see* Tax Ct. Op.

at 593, and the Association has not challenged that finding in this venue.[7]

We hasten to add, moreover, that the mode of analysis used in *NCAA* and *Suffolk County* cannot be employed here. Because those cases each involved a particular event, they looked to the time frame of the event in determining the regularity with which the business was carried on. *See NCAA*, 914 F.2d at 1422-23; *Suffolk County*, 77 T.C. at 1322-24. In a case like this one, where the publication of an ad book is not pegged to a particular event, a court must assay the activities which collectively comprise the business, and look to the overall time frame in which they occurred. For present purposes, that means the time frame in which the Association solicited, sold, and published advertising. See Treas. Reg. § 1.513-l(b) (noting that the activities of soliciting, selling, and publishing advertising collectively constitute a business). Those activities persisted for approximately 46 weeks a year.[8] *See* Tax Ct. Op. at 593. This is more than sufficient regularity by any standard.

The Association next argues that it did not regularly engage in a business because it did not carry on the advertising activity with the same entrepreneurial zeal that might typify a commercial operator. But this is an

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[7] It is interesting to note that Proposed Treas. Reg. § 1.513-4 draws a clear distinction between periodicals and material published in connection with a specific sponsored event. We find the distinction significant.

[8] To be sure, the Association argues that the time frame is much shorter because, although solicitation and sales transpired 46 weeks a year, publication occurred within a very narrow temporal window. This argument is disingenuous. Treas. Reg. § 1.513-l(b) refers to the activities of soliciting, selling, and publishing advertising as a singular business. That business must be regularly carried on, but there is no requirement that each task within the scope of the business must be carried on regularly.

ill-conceived comparison. Although the purpose behind the unrelated business income tax is to create a more level playing field between taxed and tax-exempt enterprises, competitive similarities are not the only factors to be taken into account. *See FOP*, 833 F.2d at 722-23. The applicable regulation stipulates that the activity in question must be judged "in light of the purpose" of the tax, but it does not require that either actual competition or competitive equality be shown. Treas. Reg. § 1.513-l(c)(1).

In this instance, the Association carried on its activities in a systematic and well-organized fashion, with a clearly defined profit motive. Given the limitations of clear - error review, we cannot disturb the lower court's finding that the Association's activities were sufficiently regular to bring them within the ambit of the regulation. *See* Tax Ct. Op. at 593.

IV. CONCLUSION

We need go no further. While the Association makes several other arguments, none requires discussion; each of them is either adequately treated in the Tax Court's opinion, or obviously incorrect, or both. It suffices to say that the Commissioner's determination of the tax due and owing rests on a sturdy factual and legal foundation.

Affirmed.

APPENDIX

Form **872** In Reply Refer To:
(Rev. August 1988) SSN or EIN 04-2462459
Department of the Treasury—Internal Revenue Service
CONSENT TO EXTEND THE TIME TO ASSESS TAX

State Police Assoc. of Massachusetts
(Name(s))
taxpayer(s) of 388 Hillside Ave. Needham, Ma. 02194
(Number, Street, City or Town, State, ZIP Code)
and the District Director of Internal Revenue or Regional Director of Appeals consent and agree to the following:

(1) The amount of any Federal Income ~~Excise~~
(Kind of tax)
tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended April 30, 1986, 1987, 1988, 1989 July 31, 1989 may be assessed at any time on or before April 30, 1993. However, if a notice of
(Expiration date)
deficiency in tax for any such period(s) is sent to the taxpayer(s) on or before that date, then the time for assessing the tax will be further extended by the number of days the assessment was previously prohibited, plus 60 days.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the

expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration date.

This agreement ends on the above expiration date regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 months after this agreement ends.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STATE POLICE ASSOCIATION OF MASSACHUSETTS, Petitioner, Appellant,	)	
v.	)	No. 97-1319
COMMISSIONER OF INTERNAL REVENUE, Respondent, Appellee.	)	

JUDGMENT

Entered: August 20, 1997

This cause came on to be heard on appeal from the decision of the United States Tax Court, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The decision of the Tax Court is affirmed.

By The Court:

Vincent Flanagan, Acting Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

APPENDIX C

T.C. Memo 1996-407

UNITED STATES TAX COURT

STATE POLICE ASSOCIATION OF MASSACHUSETTS, Petitioner,	)
v.	)
COMMISSIONER OF INTERNAL REVENUE, Respondent	)

Docket No. 15443-93. Filed September 4, 1996.

Alfred J. O' Donovan, for petitioner.

Catherine R. Chastanet and Christopher W. Schoen, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WELLS, Judge: Respondent determined deficiencies in petitioners' Federal income taxes, additions to tax, and penalties for the taxable years as follows:

		Additions to Tax			
TYE April 30	Deficiency	Sec. 6651(a)(1)	Secs. 6653(a)(1)/ 6653(a)(1)(A)	Secs. 6653(a)(2)/ 6653(a)(1)(B)	Sec. 6661
1986	$214,988	$53,747	$10,749	1	$53,747
1987	238,492	59,623	11,925	1	59,623
1988	266,342	66,585	13,317	1	66,585
1989	239,264	59,816	11,963	1	59,816

		Additions to Tax and Penalties			
TYE July 31	Deficiency	Sec. 6651(a)(1)	Sec. 6653(a)(1)(A)	Sec. 6653(a)(1)(B)	Secs. 6661/2
1989	$ 57,636	$14,409	$2,882	1	$14,409
1990	180,366	45,901			36,073
1991	155,345	38,836			31,069

[1] 50 percent of the interest due on the deficiency.

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

The issues to be decided are:

1. Whether the period of limitations on assessment and collection had expired with respect to certain of the taxable periods in issue at the time respondent sent to petitioner the statutory notice of deficiency in issue in the instant case;

2. Whether income generated by petitioner's solicitation program for its yearbook is unrelated business income subject to tax pursuant to section 511 for the taxable periods in issue; and

3. Whether petitioner is liable for additions to tax pursuant to sections 6651(a)(1), 6653(a)(1) and (2), 6653(a)(1)(A) and (B), and 6661(a), and penalties pursuant to section 6662(a) for certain of the taxable periods in issue.

FINDINGS OF FACT

Some of the facts have been stipulated for trial pursuant to Rule 91 and are incorporated herein by reference. We find as facts the parties' stipulations of fact.

Petitioner is a labor organization exempt from taxation pursuant to section 501(c)(5). Petitioner's principal office, at the time of the filing of the petition in the instant case, was 388 Hillside Avenue, Needham, Massachusetts.

The purpose of petitioner is: (1) To represent and act as bargaining agent in matters of policy, wages, hours, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, of and for the members of the Uniformed Branch of the Division of State Police, Department of Public Safety, of the Commonwealth of Massachusetts, and (2) to promote and develop a friendly and fraternal spirit among all of the members of the Uniformed Branch of the Division of State Police.

Approximately 1,100 to 1,300 State troopers were eligible to join petitioner during each of the taxable years in issue. Nearly all those who were eligible to be members were members. The Constabulary was the official publication of petitioner and was intended for both internal and external use. The Constabulary was characterized as petitioner's "yearbook" or "adbook".

Agreements

Petitioner entered into a contract with Brent-Wyatt East (BWE), on January 22, 1982 (1982 Agreement), in which BWE agreed to conduct an "earnings" program (the Program) for petitioner.

The 1982 Agreement provided that:

(i) Its term would be for 3 years from January 1, 1982, but would terminate upon written notice by one party to the other of breach and the failure of the defaulting party to cure the breach within 15 days of receipt of the notice;

(ii) BWE agreed to conduct the Program by "marketing advertising" on behalf of petitioner through a telephone solicitation and to produce, publish, and lay out at least 1,000 yearbooks;

(iii) petitioner would receive 41 percent of gross weekly collections and any amounts left after all Program obligations have been met but not less than $100,000 for each solicitation, which was to occur annually;

(iv) BWE would receive 7 percent of gross weekly collections;

(v) telephone salesmen, field representatives, and office managers, who worked for both petitioner and BWE, would receive 31.5 percent of gross weekly collections;

(vi) the parties would receive amounts due them at weekly settlement meetings;

(vii) all checks received as a result of the solicitation would be made payable to petitioner and turned over to the office manager or trooper monitor on duty; any check received that was not made payable to petitioner would be returned to its maker;

(viii) daily reports of collected funds would be maintained and submitted weekly to petitioner's treasurer;

(ix) petitioner would maintain a separate checking account, and all expenses incurred directly from the solicitation and approved by petitioner and BWE would be paid from that account;

(x) BWE would be an independent contractor and not the agent of petitioner; petitioner would have no direction or control over BWE's personnel or business activities, and BWE would save petitioner harmless from any liability resulting from BWE's business activities; BWE could not incur indebtedness or expenses in the name of petitioner;

(xi) petitioner would provide a monitor (Trooper Monitor) who would be present at all times during the telephone solicitation;

(xii) petitioner would provide an editing staff for the yearbook;

(xiii) BWE would supply the marketing personnel, but petitioner had the right to terminate the employment of any employee or subcontractor found to be using pressure or misrepresentation;

(xiv) during the Program, BWE had authority to use petitioner's name, and petitioner insured the cooperation of itself and its members;

(xv) petitioner had the right at any time to exempt any subscriber, prospective subscriber or advertiser for any reason whatsoever;

(xvi) petitioner had the right to inspect any field office from which the solicitation took place at any time without prior notice to determine whether BWE was fulfilling its obligation under the Agreement;

(xvii) petitioner had the right to demand that written notices be placed in a conspicuous place at BWE's offices, and no office could operate without such notices;

(xviii) BWE would keep daily logs which contained specific information and would advise all police departments in the area of an ongoing solicitation;

(xix) petitioner's trooper representatives had the right to accept or reject the office space to be used by BWE for the solicitation;

(xx) solicitations for the earnings program could be made only by telephone.

By Memorandum of Agreement dated October 17, 1984, petitioner and BWE agreed that there would be no termination date for the 1982 Agreement, and that the Agreement would run until voluntarily terminated by one of the parties.

Petitioner entered into a contract with BWE on January 1, 1988, (1988 Agreement) which had terms similar to the 1982 Agreement, as amended, except that:

(i) the 1988 Agreement would continue indefinitely but would terminate-upon written notice by one party to the other of breach and the failure of the defaulting party to cure the breach within 15 days of receipt of the notice;

(ii) petitioner would receive 42 percent of gross weekly collections and any amounts left after all Program obligations have been met but not less than $100,000 for each solicitation, which was to occur annually;

(iii) telephone salesmen, field representatives, and office managers would receive 30.5 percent of gross weekly collections;

(iv) the 1988 Agreement would terminate upon an uncured breach by one party.

Petitioner entered into a contract with R. H. McKnight Co., Inc. (McKnight), on June 20, 1990 (1990 Agreement), which had terms similar to the 1982 Agreement, as amended, and the 1988 Agreement, except that:

(i) McKnight replaced BWE;

(ii) reference to yearbooks was deleted, and terms referring to a program guide which was to be distributed in connection with an annual road race known as the "State Police Chase" were inserted;

(iii) reference to telephone salesmen, field representatives, and office managers was deleted, and a provision was inserted which provided that persons employed by McKnight for the purposes of soliciting funds would be paid 27.5 percent of funds resulting from such persons' solicitations.

Telephone Solicitations

BWE and McKnight described their business as publishing and sales. BWE or McKnight employed a subcontractor to conduct a solicitation campaign during each of the years in issue pursuant to the Agreements.

Each campaign consisted of telephone solicitations in which 8 to 12 callers called businesses located in the Commonwealth of Massachusetts. Individual residences were not solicited. Telephone solicitors used a stock solicitation format that prompted the solicitor to tell the person called that the solicitor was calling on behalf of the State Police Association of Massachusetts; that the Troopers were putting together their annual business to business directory; that the caller was calling local businesses to show support for the State Police Association by purchasing a sponsorship in a book; and that money derived from the solicitation is used to improve working conditions for the membership.

Telephone solicitations were conducted during normal business hours 5 days per week, except on those days on which an evening solicitation was conducted, when

solicitations began at 12 noon. Telephone solicitations were conducted approximately 46 weeks per year. Telephone solicitations were monitored by a member of petitioner (the Trooper Monitor) to answer questions, if necessary, and to ensure that the solicitation did not involve coercion, fraud, or duress. Businesses which were solicited by telemarketers could have made a contribution to petitioner without having their name or any other identifying statement appear in print in The Constabulary. Each year, only five or six businesses that were solicited pursuant to the earnings program contributed money to The Constabulary without being recognized by name in The Constabulary.

In operation, petitioner exercised substantial control over BWE and McKnight. Petitioner set the office hours for advertisement solicitations for The Constabulary; set rules for depositing gross receipts and returning bad checks; monitored the use of telephones for personal calls by ad sellers; required BWE and McKnight office managers to be present at weekly reconciliation meetings; demanded to be advised of any problems; demanded the names of all telephone solicitors; required BWE and McKnight to maintain personal data files on all employees; and geographically limited the areas to which advertisement solicitations could be made.

BWE and McKnight are considered professional fund raisers under the Massachusetts Charitable Solicitation Act.

Collecting and Accounting for Funds

When a business agreed to make a "payment" to petitioner, the telephone solicitor made a notation on an envelope itemizing the business, its address, the person he spoke with, and the amount of the payment. The envelope was delivered by a delivery service, such as United Parcel

Service (UPS), to the business, which delivered a check to the UPS messenger, who returned it to the solicitation office.

Checks received by the solicitation office were made payable to petitioner and were deposited in a bank account owned by petitioner. When checks came into The Constabulary office, they were counted and deposited in petitioner's bank account by the office manager and a trooper. BWE and McKnight or its subcontractor, Mr. Norman Berube, accounted for all receipts directly to petitioner.

Amounts collected were distributed at the weekly meetings according to the Agreements between petitioner and BWE or McKnight and the weekly settlement reports.

Publication of The Constabulary

Pursuant to the Agreements, BWE and McKnight published The Constabulary once in each year in issue. The Constabulary was published in five editions: Troop A, Troop A Greater Boston, Troop B, Troop C, and Troop D.

In each year, the following numbers of copies of The Constabulary were printed:

Year	Troop A	Troop A Boston	Troop B	Troop C	Troop D
1986	1,000	800	900	1,150	1,350
1987	1,100	800	1,100	1,250	1,350
1988	1,500	800	1,300	1,400	1,500
1989	2,000	600	1,400	1,500	1,500
1990	2,000	600	1,400	1,500	1,500
1991	2,000	600	1,400	1,500	1,500

The Constabulary was printed in two sections, the common section and the Display Ad section. The common section contained, during each year in issue, articles and editorials that were identical in each of the five editions. Additional material, other than articles and editorials, was common to every edition. The material other than articles and editorials that was not common to every edition related to businesses which were located within the geographic location of the troop.

The Display Ad section contained display ads and listings. The display ads (displays), which are indexed in alphabetical order in an "Advertiser's Index" or "Index to Display Ads" in the back of each edition of The Constabulary, consisted of messages covering from one-sixth of one page to a full page. The display ads contained blocking, illustrations, signatures, trademarks, and emblems. The display ads included such well-known companies or products as McDonald's, AT&T Corp., John Hancock, Sheraton Hotels, Mobil Oil Corp., Kentucky Fried Chicken, Rockport, and AAMCO Transmissions. Some of the display ads contained well known slogans that sponsors also used in their national advertising.

The listings were placed after the displays in a section entitled "Business Directory". The Business Directory in The Constabulary for the 1986 through 1991 editions consisted of two or three-line listings of various businesses by name, telephone number (except for 1991), and address (city and State only), arranged alphabetically by type of business.

The beginning of each business directory in each edition of The Constabulary published for the years 1986 through 1991 states:

> ON THE FOLLOWING PAGES, listed by category of service or product, are advertisers who support the State Police Association of Massachusetts. We urge you to consider these fine companies when making purchases for yourself or your family.

Each 1986 and 1987 edition of The Constabulary contains "A Message from the President..." of petitioner which states:

> As president of the State Police Association of Massachusetts, I am proud to announce this year's edition of The Constabulary. This book is an attempt to showcase what the functions of the Massachusetts State Police are all about, and I hope that the readers will find it enjoyable.
>
> As in the past, this book is made possible by the generous contributions of those who advertise in it. It is our hope that the reader will make use of such advertisements and solicit the establishments herein.

The content of editorials and articles published in The Constabulary was determined by the editorial staff of troopers. Most of the articles in The Constabulary were written by troopers who were editors. Trooper editors reviewed every article and editorial before it was published.

Distribution of The Constabulary

In each year, approximately 300 to 400 copies of The Constabulary were distributed to attendees of the State Police

Chase, an annual picnic and sports day, and approximately 1,000 copies were hand-carried to trooper barracks over the course of a couple of weeks for distribution to members of petitioner. Each year the remaining copies of The Constabulary were delivered to businesses. In some, but not all instances, copies of The Constabulary were sent to particular businesses to verify that petitioner, and not some other organization, published the book.

During the years in issue, The Constabulary, however, was not arranged as a program guide for the annual State Police Chase sporting event. The 1986, 1987, and 1988 editions of The Constabulary do not mention the State Police Chase, and in the 1989, 1990, and 1991 editions, the two- or three-page articles on the State Police Chase relate to the previous year's event. The Constabulary was never sold to anyone for a charge.

Revenues

Petitioner received approximately the following gross amounts from displays:

Year	Amount
1986	$265,400
1987	565,700
1988	529,000
1989	440,000
1990	339,300
1991	370,500

Petitioner received approximately the following gross amounts from listings:

Year	Amount
1986	$1,085,300
1987	1,043,300
1988	1,070,400
1989	1,009,600
1990	805,700
1991	790,800

Operations

Petitioner had total income and expenses relating to The Constabulary for the taxable periods in issue as follows:[1]

Year Ending	Constabulary Income	Constabulary Expense
April 30, 1986	$1,244,241	$ 731,854
April 30, 1987	1,344,752	781,270
April 30, 1988	1,693,025	942,884
April 30, 1989	1,589,793	885,075
July 31, 1989	408,176	216,442
July 31, 1990	1,312,635	740,706
July 31, 1991	1,195,589	737,692
TOTAL	$8,788,211	$5,035,923

Petitioner used a price list in its solicitation program for The Constabulary. BWE and McKnight set the prices for

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[1] The Constabulary income amounts, which are reported on a fiscal year basis, differ from the gross amounts from displays and listings, which are compiled on a calendar year basis.

the various sized displays and listings with petitioner's approval. Petitioner's president, Kevin W. Regan, sent letters advising recipients that petitioner was "selling advertising in the next edition of The Constabulary yearbook". In its letter, petitioner set forth its price list for different sizes of "advertisements." Petitioner advised prospective advertisers that the "prices" for advertisements in The Constabulary were as follows:

Directory Advertisements

Full page	$995
3/4 page	850
1/2 page	595
1/3 page	450
1/4 page	395
1/6 page	295

Display Advertisements

Large bordered	$195
Small bordered	135
3-line listing	95
2-line listing	55

Period of Limitations

By letter dated May 21, 1992, petitioner's representative agreed to execute on behalf of petitioner a Consent to Extend the Time to Assess Tax (Form 872) to allow the assessment of additional Federal income tax to occur on or before December 31, 1992, for the periods ended April 30, 1986 through 1989, and July 31, 1989.

Petitioner and respondent by their authorized representatives executed a Consent to Extend the Time to Assess Tax (Form 872) on August 3, 1992. The first page of the Form 872 stated, in pertinent part, as follows:

State Police Assoc. of Massachusetts
(Name(s))
taxpayer(s) of 388 Hillside Ave. Needham, Ma. 02194
(Number, Street, City or Town, State, ZIP Code)
and the District Director of Internal Revenue or Regional Director of Appeals consent and agree to the following:

(1) The amount of any Federal Income ~~Excise~~[2] tax
(Kind of Tax)
on any return(s) made by or for the above taxpayer(s) for the period(s) ended April 30, 1986, 1987, 1988, 1989 and July 31, 1989 may be assessed at any time on or before April 30, 1993.
(Expiration Date)
However, if a notice of deficiency in tax for any such period(s) is sent to the taxpayer(s) on or before that date, then the time for assessing the tax will be further extended by the number of days the assessment was previously prohibited, plus 60 days.

The only returns filed by petitioner for the periods ended April 30, 1986 through 1989, and July 31, 1989, were

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[2] Petitioner's representative modified the executed Form 872 by deleting the reference to excise tax. A group manager in the exempt organizations portion of the EPEO division of the Brooklyn District executed petitioner's modified Form 872 on behalf of respondent on Aug. 3, 1992.

Returns of Organization Exempt from Income Tax (Form 990).

OPINION

Jurisdiction

The first issue we must decide is whether the period of limitations on assessment had expired with respect to certain of the taxable periods in issue prior to the date respondent sent the notice of deficiency in issue in the instant case to petitioner. Pursuant to section 6501(g)(2),[3] the good faith filing of a Form 990 by an exempt organization commences the running of the period of limitations against assessment of tax on unrelated business income if the organization is later held to be a taxable organization. *California Thoroughbred Breeders Association v. Commissioner*, 47 T.C. 335, 339 (1966). Because petitioner pled the bar of the statute of limitations, petitioner must show that the statutory notice was issued beyond the normally applicable period of limitations. In *Adler v. Commissioner*, 85 T.C. 535, 540 (1985), we stated:

> The bar of the statute of limitations is an affirmative defense, and the party raising it must specifically plead it and carry the burden

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[3] Sec. 6501(g)(2) provides:

> If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033, and if such taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, such return shall be deemed the return of the organization for purposes of this section.

> of proof with respect thereto. Rules 39, 142(a). Where the party pleading such issue makes a showing that the statutory notice was issued beyond the normally applicable statute of limitations, however, such party has established a prima facie case. At that point, the burden of going forward with the evidence shifts to the other side, and the other party has the burden of introducing evidence to show that the bar of the statute is not applicable. Where the other party makes such a showing, the burden of going forward with the evidence then shifts back to the party pleading the statute, to show that the alleged exception is invalid or otherwise not applicable. The burden of proof, i.e., the burden of ultimate persuasion, however, never shifts from the party who pleads the bar of the statute of limitations. [Citations omitted.]

In the instant case, on November 13, 1989, petitioner filed Returns of Organization Exempt from Income Tax (Forms 990) for the periods ended April 30, 1986 through 1989, and July 31, 1989. Petitioner did not file Forms 990-T for unrelated business income tax for those periods. Respondent's statutory notice was issued on April 22, 1993.

Petitioner contends that it determined in good faith that it was an exempt organization, had no taxable income, and therefore was not required to file any return other than Form 990. Accordingly, petitioner argues that section 6501(g) applies to commence the running of the period of limitations for the purposes of the Form 990-T and that, because the Form 872 that petitioner signed referred only to

"return(s) made", the Form 872 did not extend the period of limitations.

In the instant case, we need not decide whether petitioner's filing of a Form 990 commenced the running of the period of limitations against assessment of the unrelated business income tax determined by respondent because, even if we were to so hold, we conclude that the Form 872 signed by the parties effectively extended that period of limitations. Petitioner argues that, because the Form 872 applies only to "return(s) made" by petitioner and because "No tax was due or could be due on the returns filed by the Petitioner for the applicable periods", the Form 872 does not extend the period of limitations to assess tax. Petitioner, however, concedes:

> it intended to extend the period in which the Respondent was required to assess a tax for unrelated business income for the periods ended April 30, 1986, April 30, 1987, April 30, 1988, April 30, 1989 and the three-month period ended July 31, 1989 (the "applicable periods") or issue a notice of deficiency to the Petitioner.

As we construe the parties' use of the language "income tax due on any return(s) made by or for the above taxpayer(s)", we think it is broad enough to include a return deemed made pursuant to section 6501(g)(2); i.e., a Form 990-T.[4] We therefore hold that the parties duly extended

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[4] Even if the language could not be construed to include a deemed return, we would conclude that the Form 872 could be reformed. Where a written agreement does not conform with the actual agreement between the parties, the Court may reform the writing to conform with the parties' intentions. *Woods v. Commissioner*, 92 T.C. 776, 782 (1989). In light of

until April 30, 1993, the period of limitations within which respondent could assess deficiencies in petitioner's unrelated business income tax for the periods in issue. The notice of deficiency was mailed to petitioner before that date, and consequently the limitations period remains open.

Unrelated Business Income

The next issue we must decide is whether the income generated from petitioner's solicitation program for The Constabulary is unrelated business income subject to tax pursuant to section 511. Petitioner argues that it merely solicited contributions and did not engage in the business of selling advertising. Respondent contends that petitioner's solicitation of displays and listings in The Constabulary constituted the sale of advertising as a trade or business.

We first examine whether petitioner sold "advertising''. The Code and the regulations do not provide a definition of the term "advertising" or "advertisement". In *Fraternal Order of Police v. Commissioner*, 87 T.C. 747 (1986), affd. 833 F.2d 717 (7th Cir. 1987), we examined whether listings similar to those in the instant case constituted "advertising". In *Fraternal Order of Police*, an organization exempt from tax pursuant to section 501(c)(8) published The Trooper magazine, which contained articles relating primarily to the duties of police officers, and two types of listings: (1) "large listings", which contained the usual elements associated with advertisements, such as blocking,

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petitioner's concession concerning its intent to extend the period of limitations, the Form 872 may properly be reformed to conform to the agreement and intent of the parties. The evidence is clear and convincing that the parties intended to extend the period of limitations with respect to returns made as well as those "deemed made" by reason of sec. 6501(g)(2).

illustrations, signatures, trademarks, and emblems, and (2) a business directory, which classified and arranged the listings in the same manner as the yellow pages of a telephone directory. *Id.* at 750. The Trooper also had an "Advertisers' Index" containing the name of the sponsor of each large listing and the page upon which its listing was located. Those sponsors included well-known companies such as American Airlines and Midas Mufflers.

In *Fraternal Order of Police*, after examining the record and copies of The Trooper magazine, we were "convinced that both the larger listings and the business listings constitute 'advertising.'" *Id.* at 754. We stated:

> To conclude otherwise we would have to ignore the fact that the vast majority of the listings in The Trooper are composed of slogans, logos, trademarks, and other information which is similar, if not identical in content, composition, and message to the listings found in other professional journals, newspapers, and the "yellow pages" of telephone directories. We also note that the contracts with OSC, FOP's business forms, and the magazine itself repeatedly use such words and phrases as "advertising revenues," "advertisers," "prospective advertisers," "advertising marketing program," and "advertising," to describe the listings and related activities. [*Id.*]

Petitioner argues that *Fraternal Order of Police* is distinguishable from the instant case because no expert testified in that case that the listings were not advertising. In the instant case, petitioner's expert concluded that, under

"generally accepted marketing theory", only 10 percent of the messages in The Constabulary were advertising. At trial, however, petitioner's expert was asked whether she knew that there was a relationship between the amount of space that a contributor's message received and the amount that was contributed. Petitioner's expert testified:

> it has just never been made specific and clear. I would assume that * * * because they * * * [petitioner] are doing things in gratitude for contributions and I would think you would be more grateful for large contributions than you would be for small contributions. But I think it really goes to a price list and I have never seen one and never heard of one and never been told that X amount buys you X space, because that would imply advertising.

When presented with an exhibit containing prices for various sized spaces in The Constabulary, petitioner's expert testified: "It looks like a price list to me."

We weigh expert testimony in light of the expert's qualifications as well as all the other credible evidence in the record. *Seagate Tech. Inc. & Consol. Subs. v. Commissioner*, 102 T.C. 149, 186 (1994). We are not bound by the opinion of any expert witness, and we will accept or reject that expert testimony when, in our best judgment, based on the record, it is appropriate to do so. *Id.*, and the cases cited therein. While we may choose to accept in its entirety the opinion of one expert, we may also be selective in the use of any portion of that opinion. *Id.*

We believe that the existence of a quid pro quo arrangement is important to an analysis of whether the displays and listings in The Constabulary constitute

advertising. Because petitioner's expert testified that she did not know that petitioner's contributors were told that there was a relationship between the amount of space a contributor's message received and the amount that was contributed, we believe that the conclusions of petitioner's expert are based upon incomplete information. Accordingly, we discount the testimony of petitioner's expert.

Petitioner next argues that one factor to be used in determining the existence of "advertising" is the contributor's intent in making a payment to the organization. Petitioner argues that contributors to The Constabulary expected no commercial benefit from their payment but merely intended to benefit petitioner. In its affirmance of our decision in *Fraternal Order of Police v. Commissioner*, *supra*, the Seventh Circuit Court of Appeals stated that the sponsor's

> motivation [to help support the families of officers killed in the line of duty] does not define * * * [the Fraternal Order of Police's] activities. To place a listing in The Trooper, each sponsor had to purchase a space and pay a prescribed rate which corresponded to the desired size of the listing. Moreover, each issue of The Trooper included the request by the editors that its readers patronize those who had paid for the listings. [*Fraternal Order of Police v. Commissioner*, 833 F.2d at 721.]

Accordingly, in the instant case, we conclude that an inquiry into the contributor's intent in making a payment to petitioner is not helpful in light of the fact that the contributors received the displays and listings in consideration of their contribution; i.e., they purchased the display or listing, and the size of the space allotted to the contributor's message was

linked to the amount paid. In any event, petitioner has not established in the instant case that the display or listing received by the contributor had a value less than the amount of the contribution given in exchange for the display or listing. Consequently, we will apply an analysis of the displays and listings similar to the one we used in *Fraternal Order of Police v. Commissioner*, 87 T.C. 747 (1986), to decide whether petitioner's displays and listings in The Constabulary constitute "advertising".

As in *Fraternal Order of Police*, the displays in The Constabulary contained the usual elements associated with advertisements such as blocking, illustrations, signatures, trademarks, and emblems. An "Advertisers' Index" contained the name of the sponsor of each display, including McDonald's, AT&T Corp., John Hancock, Sheraton Hotels, and Mobil Oil Corp., among other well-known companies, and specified the page upon which the display was located. Between the displays and the "Advertiser's Index" appeared a section of listings called the Business Directory wherein various businesses were identified by name and classified by type of business, as in the yellow pages of a telephone directory.

We have examined the record and copies of The Constabulary, and we are convinced that both the displays and the listings constitute "advertising". Many of the displays are composed of slogans, logos, trademarks, and other information which is similar if not identical in content, composition, and message to the listings found in other professional journals, newspapers, and the yellow pages of telephone directories. Additionally, the contracts with BWE and McKnight, petitioner's correspondence' and The Constabulary itself repeatedly use such words and phrases as "advertising", "advertisements", "advertisers", "ad book", and "marketing advertising" to describe the displays and

listings and related activities. Consequently, we conclude that the displays and listings in The Constabulary constitute "advertising".

Petitioner next argues that section 1.513-l(b), Income Tax Regs., exempts its solicitation activity from being characterized as a trade or business because its "advertising" is a low-cost article. That regulation addresses charitable fund raising programs where low-cost goods are sent out by organizations along with a solicitation to contribute money. In its sales of advertising, however, petitioner did not follow such a procedure. Additionally, the lowest charge for any of petitioner's displays or listings was, during some of the periods in issue, $55 for a two-line listing in the business directory, a cost that cannot be properly described as "low". Accordingly, we conclude that petitioner is not eligible for the low-cost article exemption.

We next examine whether petitioner's selling of advertising space constitutes an "unrelated trade or business" for purposes of section 512. Generally, the selling of advertising space is an "activity which is carried on for the production of income from the sale of goods" and is therefore a "trade or business" within the meaning of section 513(c). The Supreme Court has interpreted section 1.513-l(b), Income Tax Regs., as "'fragmenting'" the enterprise of publishing into its component parts", segregating "the 'trade or business' of selling advertising space from the 'trade or business' of publishing a journal". *United States v. American College of Physicians*, 475 U.S. 834, 839 (1986). The trade or business of soliciting, selling, and publishing advertising does not lose identity as a trade or business when the advertising appears in an exempt organization's periodical that contains editorial matter related to the exempt purposes of the organization. *Id.* (citing sec. 1.513-l(b), Income Tax Regs.).

Accordingly, we segregate the publishing of the editorial matter in The Constabulary from the soliciting, selling, and publishing of advertising space in The Constabulary. Petitioner concedes that the advertising activity is not substantially related to petitioner's exempt purpose. Consequently, we hold that petitioner was engaged in an unrelated trade or business of soliciting, selling, and publishing advertising space.

We next examine whether petitioner's unrelated trade or business was "regularly carried on" within the meaning of section 512. Petitioner argues that its advertising activity was not regularly carried on. The regulations provide the general requirement:

> In determining whether trade or business from which a particular amount of gross income derives is "regularly carried on," within the meaning of section 512, regard must be had to the frequency and continuity with which the activities productive of the income are conducted and the manner in which they are pursued. * * * [Sec. 1.513-l(c)(1), Income Tax Regs.]

The regulations also provide that "This requirement must be applied in light of the purpose of the unrelated business income tax to place exempt organization business activities upon the same tax basis as the nonexempt business endeavors with which they compete." *Id.* After stating the general principles, the regulations next categorize an exempt organization's business on the basis of its nonexempt counterparts' "Normal time span of activities." Sec. 1.513-l(c)(2)(i), Income Tax Regs. The regulations inquire whether the exempt organization's income-producing

activities are of a kind normally conducted by nonexempt commercial organizations on (1) a year-round basis or (2) only a seasonal basis. *Id.* For "year-round" activities, the regulations provide that "the conduct of such activities by an exempt organization over a period of only a few weeks does not constitute the regular carrying on of trade or business", but that the conduct of such activities "for one day each week would constitute the regular carrying on of trade or business." *Id.* For "seasonal" activities, the regulations provide that "the conduct of such activities by an exempt organization during a significant portion of the season ordinarily constitutes the regular conduct of trade or business." *Id.*

The regulations provide special rules for "intermittent activities". Sec. 1.513-l(c)(2)(ii) and (iii), Income Tax Regs. We have previously noted:

> The regulation does not, in terms, define "intermittent". We gather from the context that an activity is to be regarded as intermittent if it is not conducted by the tax-exempt organization on a year round basis (or, with regard to an activity that is normally conducted by nonexempt organizations only on a seasonal basis, the activity is intermittent if it is not conducted by the tax-exempt organization for substantially the full season). * * * [*Veterans of Foreign Wars, Mich. v. Commissioner*, 89 T.C. 7, 32 (1987).]

The regulations, apparently equating "intermittent" with "discontinuous" and "periodical", provide that exempt organization business activities "which are engaged in only discontinuously or periodically will not be considered

regularly carried on if they are conducted without the competitive and promotional efforts typical of commercial endeavors." Sec. 1.513-l(c)(2)(ii), Income Tax Regs. For example, "the publication of advertising in programs for sports events or music or drama performances will not ordinarily be deemed to be the regular carrying on of business." *Id.*

Additionally, the regulations provide that "Certain intermittent income producing activities occur so infrequently that neither their recurrence nor the manner of their conduct will cause them to be regarded as trade or business regularly carried on." Sec. 1.513-l(c)(2)(iii), Income Tax Regs. The regulations add that "such activities will not be regarded as regularly carried on merely because they are conducted on an annually recurrent basis." *Id.*

In the instant case, petitioner advances two arguments that its advertising activity is not "regularly carried on" within the meaning of section 1.513-l(c)(1), Income Tax Regs. Petitioner's first argument is that BWE's and McKnight's activities should not be attributed to petitioner for purposes of determining whether petitioner regularly carried on its trade or business of selling and publishing advertising. Petitioner relies on *NCAA v. Commissioner*, 914 F.2d 1417 (10th Cir. 1991), revg. 92 T.C. 456 (1989). In *NCAA*, this Court concluded that the publisher's activities should be attributed to the National Collegiate Athletic Association (NCAA) because the NCAA failed to provide evidence regarding the extent and manner of the publisher's conduct in connection with the solicitation, sale, and publication of advertising in the tournament programs. *NCAA v. Commissioner*, 92 T.C. at 468. On appeal, however, the Tenth Circuit Court of Appeals focused instead on the fact that the programs were distributed over less than a 3-week

span at an event occurring only once a year. *NCAA v. Commissioner*, 914 F.2d at 1421-1424.

In the instant case, petitioner argues that the activities of BWE and McKnight should not be attributed to petitioner. Petitioner argues that its contracts with each publisher provided: (1) That the publisher was an independent contractor and not the agent of petitioner, (2) that petitioner had no direction or control over BWE's personnel or business activities, and (3) that the publisher agreed to "save" petitioner harmless from any liability resulting from the publisher's activities. Petitioner points to the additional fact that the telephone callers were employed by a subcontractor of BWE and McKnight, and petitioner asserts that the subcontractor had complete control over the callers.

In *NCAA*, this Court found an agency relationship because the contract between the NCAA and the publisher expressly designated the publisher as the NCAA's "exclusive agent" for the sale of advertising in the program, and because the contract manifested an intent (1) that the publisher would act on behalf of the NCAA in conducting the sale of advertising, and (2) that NCAA could control the publisher's activities. *NCAA v. Commissioner*, 92 T.C. at 467. In the instant case, petitioner's agreements with BWE and McKnight provide that each of the latter

> is an independent contractor and as such * * * [petitioner] has no direction and control over the personnel or business activities of * * * [publisher]. * * * [publisher] is not the agent of * * * [petitioner] and shall not incur any expenses, bills, indebtedness or obligations for or in the name of [petitioner] and shall save * * * [petitioner] harmless from any liability

> whatsoever as a result of * [publisher's] business activities.

The manner in which the parties to an agreement designate their relationship is not controlling. *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 437 (1905). A true agency relationship may be established despite the parties' designation to the contrary. See *id.* at 438 (quoting *Connecticut Mutual Life Insurance Co. v. Spratley*, 172 U.S. 602, 615 (1899)).

In the instant case, we conclude that the agreements manifested an intent that BWE and McKnight would act on behalf of petitioner in conducting the sale of advertising. The agreements provided that BWE or McKnight (as the case might be) "has full authority to use the good name of * * * [petitioner] during the course of the earnings program." Additionally, the agreements provided a payment collection procedure in which "All checks or money orders received as a result of the solicitation shall only be made payable to * * * [petitioner]." By providing BWE and McKnight with the authority to use petitioner's name and to collect petitioner's solicitation payments, the agreements authorized those companies to act on behalf of petitioner in conducting the sale of advertising.

Additionally, we conclude that petitioner could control BWE's and McKnight's activities. The agreements provided:

> [petitioner] shall have the right to inspect any field offices or other offices from which the solicitation program is taking place without prior notice and at any time so as to determine whether or not * * * [BWE or McKnight] is fulfilling its obligations under this AGREEMENT.

Petitioner reserved the right "to exempt at any time any subscriber or any prospective subscriber or advertiser for any reason whatsoever." BWE or McKnight had a duty to provide each Monday a copy of the daily reports for the previous week of all collected funds. Accordingly, we conclude that petitioner could and did control BWE's and McKnight's activities. In the instant case, we are convinced that neither the compensation structure, which shifted part of the risk of loss to BWE and McKnight, nor the presence of the indemnification clause in favor of petitioner negates the agency relationship. Accordingly, we conclude that petitioner had an agency relationship with BWE and with McKnight, and that BWE's and McKnight's activities, as well as those of their subcontractors, are to be attributed to petitioner for purposes of determining whether petitioner's trade or business of soliciting, selling, and publishing advertising space was "regularly carried on" within the meaning of section 512.[5]

Citing *Suffolk County Patrolmen's Association v. Commissioner*, 77 T.C. 1314 (1981), petitioner next argues that the time and effort spent in the solicitation of advertising for The Constabulary should not be considered in deciding whether its trade or business is regularly carried on. Petitioner points to our conclusion in that case that "nowhere in the regulations or the legislative history of the tax on unrelated business income is there any mention of time apart

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[5] Compare *Fraternal Order of Police v. Commissioner*, 87 T.C. 747 (1986), affd. 883 F.2d 717 (7th Cir. 1987), where an exempt organization, having contracted with another entity to publish a magazine and to sell advertising space therein on its behalf, was found to be an active participant in the publication of the magazine because it could appoint the executive editor, prepare editorials and feature articles, oversee and control solicitations of business listings, and control the bank account and the reprint of articles.

from the duration of the event itself." *Id.* at 1323. Petitioner also points to the opinion of the Tenth Circuit Court of Appeals in *NCAA* that the basketball tournament "must be considered the actual time span of the business activity sought to be taxed here". *NCAA v. Commissioner*, 914 F.2d at 1423.

Petitioner argues that, even if BWE's and McKnight's activities are attributed to petitioner, the mere employment of an independent commercial firm does not itself render the trade or business "regularly carried on" within the meaning of section 1.513-1(c)(1), Income Tax Regs. Finally, petitioner argues that its intermittent activities were not conducted with the competitive or promotional efforts typical of commercial endeavors.

We conclude that the facts of *Suffolk County* and *NCAA* are distinguishable from those of the instant case. In *Suffolk County*, although a large percentage of the organizations annual vaudeville shows' gross receipts derived from the sale of advertising for the shows' program guides, we defined the taxpayer's trade or business for purposes of section 513 as the annual vaudeville shows.[6] *Suffolk County* antedated *United States v. American College of Physicians*, 475 U.S. 834 (1986). In *Suffolk County*, we did not segregate the business of the annual vaudeville shows from the publishing of the shows' program guides, nor did we segregate the publishing of material relating to the shows from the business of selling and publishing advertising space

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[6] *Suffolk County Patrolmen's Association v. Commissioner*, 77 T.C. 1314, 1319 (1981) ("Although petitioner does dispute that the annual vaudeville show constituted a trade or business, its primary argument herein is that even if the show was a trade or business it was not 'regularly carried on.'"); *id.* at 1322 n.10 ("Respondent maintains, and we agree, that the actual performance of the vaudeville show and the solicitation of advertising for the program guide are a single inseparable activity.").

in the program guides. Accordingly, we conclude that *Suffolk County* is not dispositive of the instant case.

NCAA, the Tenth Circuit Court of Appeals defined the taxpayer's trade or business for purposes of section 513 as "the publication of advertisements in programs" during the time span of the basketball tournament. *NCAA v. Commissioner*, 914 F.2d at 1423. In contrast, the facts in the instant case show that petitioner's solicitation, sale, and publishing of advertising space was undertaken apart from any discrete event or show with a limited, specified duration.

Although petitioner argues that publication of The Constabulary was tied to the State Police Chase, an annual, 1-day sports event,[7] it did not object to respondent's proposed finding of fact that "During the years in issue, The Constabulary was not arranged as a program guide for the annual 'State Police Chase' sporting event." Additionally, based upon our own review of The Constabulary, we conclude that it was not a program for the State Police Chase, which was mentioned in only the 1989, 1990, and 1991 editions. In The Constabulary for each of those years, the State Police Chase of the prior year was profiled in a two- or three-page article. Accordingly, we conclude that The Constabulary was not tied to a sports event and that section 1.513-1(c)(2)(ii), Income Tax Regs., therefore does not apply to the instant case. Consequently, *NCAA* is distinguishable from the facts of the instant case.

In the instant case, we have held, *supra* p. 25, that petitioner's unrelated trade or business for purposes of section 513 was soliciting, selling, and publishing advertising

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[7] As we have stated, *supra* p. 27, sec. 1.513-1(c)(2)(ii), Income Tax Regs., provides that "the publication of advertising in programs for sports events or music or drama performances will not ordinarily be deemed to be the regular carrying on of business."

space. The advertising business is an income-producing activity "of a kind normally conducted by nonexempt commercial organizations on a year-round basis". Sec. 1.513-1(c)(2)(i), Income Tax Regs. In deciding whether petitioner's business was "regularly carried on" within the meaning of section 512 and the regulations thereunder, we examine all activities of petitioner's advertising "trade or business", which include soliciting, selling, and publishing commercial advertising. *United States v. American College of Physicians, supra* at 839 (citing sec. 1.513-1(b), Income Tax Regs.).

We have concluded, *supra* pp. 30-31, that the activities of BWE and McKnight and their subcontractors are to be attributed to petitioner for purposes of determining whether petitioner's business was "regularly carried on". Through those entities, petitioner conducted a solicitation program 8 hours a day for approximately 46 weeks a year. Petitioner distributed The Constabulary once each year at the State Police Chase, hand carried approximately 1,000 copies to troopers' barracks over the span of a couple of weeks, and delivered the remaining copies to businesses. We conclude that such activities are sufficiently frequent and continuous to be characterized as "regularly carried on" within the meaning of section 1.513-1(c)(2)(i), Income Tax Regs.

We have considered all remaining arguments of petitioner concerning the unrelated business income issue and find them to be without merit. Based on the record in the instant case, we conclude that all the elements of sections 512 and 513 and section 1.513-1(a), Income Tax Regs., have been met. Consequently, we hold that petitioner is liable for unrelated business income tax on its advertising income.

Additions to Tax

Respondent determined in the notice of deficiency that petitioner is liable for additions to tax pursuant to sections 6651(a)(1), 6653(a)(1) and (2), 6653(a)(1)(A) and (B), and 6661(a), and penalties pursuant to section 6662(a), for certain taxable periods in issue. The instant case involves a complex and close question of law. See *Metra Chem. Corp. v. Commissioner*, 88 T.C. 654, 661 (1987); *Belz Inv. Co. v. Commissioner*, 72 T.C. 1209, 1233 (1979), affd. 661 F.2d 76 (6th Cir. 1981). Although we have distinguished *Suffolk County Patrolmen's Association v. Commissioner*, 77 T.C. 4314 (1981), we conclude that the case provided petitioner with substantial authority for its tax treatment of income from The Constabulary and that petitioner's reliance on the case was reasonable under the circumstances, considering the fact that this area of the law was developing during the periods in issue. Additionally, we conclude that petitioner reasonably relied on the advice of its counsel that it need not file Forms 990-T for the periods in issue. Accordingly, we hold that petitioner is not subject to the additions to tax or penalties for any of the taxable periods in issue.

To reflect the foregoing,

Decision will be entered under Rule 155.

APPENDIX D

T.C. Memo 1996-407

UNITED STATES TAX COURT

STATE POLICE ASSOCIATION OF MASSACHUSETTS, Petitioner,	)	
v.	)	Docket No. 15443
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

DECISION

Pursuant to the opinion of the Court filed September 4, 1996, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income tax due from petitioner as follows:

YEAR ENDING	AMOUNT
April 30, 1996	$214,988
April 30, 1987	$238,492
April 30, 1988	$266,342
April 30, 1989	$239,264
July 31, 1989	$ 57,636
July 31, 1990	$180,366
July 31, 1990	$155,345

That there are no additions to tax due from petitioner for the taxable years ending April 30, 1986, April 30, 1987, April 30, 1988, April 30, 1989, July 31, 1989, July 31, 1990 and July 31, 1991 pursuant to the provisions of IRC section 6651.

That there are no additions to tax due from petitioner for the taxable years ending April 30, 1986, April 30, 1987, April 30, 1988, April 30, 1989 and July 31, 1989 pursuant to the provisions of IRC section 6653.

That there are no additions to tax due from petitioner for the taxable years ending April 30, 1986, April 30, 1987, April 30, 1988, April 30, 1989 and July 31, 1989 pursuant to the provisions of IRC section 6661.

That there are no additions to tax due from petitioner for the taxable years ending July 31, 1990 and July 31, 1991 pursuant to the provisions of IRC section 6662.

/s/
Thomas B. Wells, Judge

Entered: Nov. 8, 1996

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

It is stipulated that interest will be assessed as provided by law on the deficiencies in tax due from the petitioner.

It is further stipulated that there are prepayment credits for the years ending April 30, 1986, April 30, 1987 and April 30, 1988 in the amounts of $5,000, $5,000 and $4,240, respectively. It is stipulated that the deficiencies for the taxable years ending April 30, 1986, April 30, 1987 and April 30, 1988 are computed without considering each of these prepayment credits.

STUART L. BROWN
Chief Counsel
Internal Revenue Service

/s/
Alfred J. O'Donovan
Counsel for Petitioner

/s/
Laurence D. Ziegler
Assistant District Counsel

APPENDIX E
26 U. S. C. (INTERNAL REVENUE CODE)

SEC. 511. IMPOSITION OF TAX ON UNRELATED BUSINESS INCOME OF CHARITABLE, ETC., ORGANIZATIONS.

(a) CHARITABLE, ETC., ORGANIZATIONS TAXABLE AT CORPORATION RATES.-

(1) IMPOSITION OF TAX. - There is hereby imposed for each taxable year on the unrelated business taxable income (as defined in section 512) of every organization described in paragraph (2) a tax computed as provided in section 11. In making such computation for purposes of this section, the term "taxable income" as used in section 11 shall be read as "unrelated business taxable income".

(2) ORGANIZATIONS SUBJECT TO TAX. -

(A) ORGANIZATIONS DESCRIBED IN SECTIONS 401(a) AND 501(C). - The tax imposed by paragraph (1) shall apply in the case of any organization (other than a trust described in subsection (b) or an organization described in section 501(c)(1)) which is exempt, except as provided in this part or part II (relating to private foundations), from taxation under this subtitle by reason of section 501 (a).

(B) STATE COLLEGES AND UNIVERSITIES. - The tax imposed by paragraph (1) shall apply in the case of any college or university which is an agency or instrumentality of any government or any political subdivision thereof, or which is owned or operated by a government or any political subdivision thereof, or by any agency or instrumentality of one or more governments or political subdivisions. Such tax shall

also apply in the case of any corporation wholly owned by one or more such colleges or universities.

SEC.512. UNRELATED BUSINESS TAXABLE INCOME.

(a) DEFINITION. - For purposes of this title -

(1) GENERAL RULE.--Except as otherwise provided in this subsection, the term "unrelated business taxable income" means the gross income derived by any organization from any unrelated trade or business (as defined in section 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business, both computed with the modifications provided in subsection (b).

SEC. 513. UNRELATED TRADE OR BUSINESS.

(a) GENERAL RULE - The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 (or, in the case of an organization described in section 511 (a)(2)(B), to the exercise or performance of any purpose or function described in section 501(c)(3), except that such term does not include any trade or business -

(1) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or

(2) which is carried on, in the case of an organization described in section 501(c)(3) or in the case of a college or university described in section 511(a)(2)(B), by the organization primarily for the convenience of its members, students, patients, officers, or employees, or, in the case of a local association of employees described in section 501(c)(4) organized before May 27, 1969, which is the selling by the organization of items of work related clothes and equipment and items normally sold through vending machines, through food dispensing facilities, or by snack bars, for the convenience of its members at their usual places of employment; or

(3) which is the selling of merchandise, substantially all of which has been received by the organization as gifts or contributions.

(c) ADVERTISING, ETC., ACTIVITIES. - For purposes of this section, the term "trade or business" includes any activity which is carried on for the production of income from the sale of goods or the performance of services. For purposes of the preceding sentence, an activity does not lose identity as a trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization. Where an activity carried on for profit constitutes an unrelated trade or business, no part of such trade or business shall be excluded from such classification merely because it does not result in profit.

Sec. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT. - Within 90 days, or 150 days if the notice is addressed to a person outside the United States,

after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42,43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) GENERAL RULE.- Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the

expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

(c) EXCEPTIONS. -

(4) EXTENSION BY AGREEMENT. - Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(g) CERTAIN INCOME TAX RETURNS OF CORPORATIONS. -

(2) EXEMPT ORGANIZATIONS. - If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033, and if such taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, such return shall be deemed the return of the organization for purposes of this section.

APPENDIX F

P. L. 105-34, SECTION 965(a)

TAXPAYER RELIEF ACT OF 1997

CODE SEC. 513. UNRELATED TRADE OR BUSINESS.

(i) TREATMENT OF CERTAIN SPONSORSHIP PAYMENTS.-

(1) IN GENERAL.--The term "unrelated trade or business " does not include the activity of soliciting and receiving qualified sponsorship payments.

(2) QUALIFIED SPONSORSHIP PAYMENTS. -- For purposes of this subsection-

(A) IN GENERAL.--The term "qualified sponsorship payment" means any payment made by any person engaged in a trade or business with respect to which there is no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgement of the name or logo (or product lines) of such person's trade or business in connection with the activities of the organization that receives such payment. Such a use or acknowledgement does not include advertising such person's products or services (including messages containing qualitative or comparative language, price information, or other indications of savings or value, an endorsement, or an inducement to purchase, sell, or use such products or services).

(B) LIMITATIONS.-

(i) CONTINGENT PAYMENTS. - The term "qualified sponsorship payment" does not include any payment if the amount of such payment is contingent upon the level of attendance at one or more events, broadcast ratings, or other factors indicating the degree of public exposure to one or more events.

(ii) SAFE HARBOR DOES NOT APPLY TO PERIODICALS AND QUALIFIED CONVENTION AND TRADE SHOW ACTIVITIES. The term "qualified sponsorship payment" does not include -

(I) any payment which entitles the payor to the use or acknowledgement of the name or logo (or product lines) of the payor's trade or business in regularly scheduled and printed material published by or on behalf of the payee organization that is not related to and primarily distributed in connection with a specific event conducted by the payee organization, or

(II) any payment made in connection with any qualifled convention or trade show activity (as defined in subsection (d)(3)(B)).

(3) ALLOCATION OF PORTIONS OF SINGLE PAYMENT. - For purposes of this subsection, to the extent that a portion of a payment would (if made as a separate payment) be a qualified sponsorship payment, such portion of such payment and the other portion of such payment shall be treated as separate payments.

Amendment Notes

Act Sec. 965(a) amended Code Sec. 513 by adding at the end thereof a new subsection (i) to read as above. The above amendment applies to payments solicited or received after December 31, 1997.

APPENDIX G

26 C.F.R.
(TREASURY DEPARTMENT REGULATIONS)

§1.513-1. Definition of unrelated trade or business.

(a) *In general.* As used in section 512 the term "unrelated business taxable income" means the gross income derived by an organization from any unrelated trade or business regularly carried on by it, less the deductions and subject to the modifications provided in section 512. Section 513 specifies with certain exceptions that the phrase "unrelated trade or business" means, in the case of an organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under section 501 (or, in the case of an organization described in section 511(a)(2)(B), to the exercise or performance of any purpose or function described in section 501(c)(3)). (For certain exceptions from this definition, see paragraph (e) of this section. For a special definition of "unrelated trade or business" applicable to certain trusts, see section 513(b).) Therefore, unless one of the specific exceptions of section 512 or 513 is applicable, gross income of an exempt organization subject to the tax imposed by section 511 is includible in the computation of unrelated business taxable income if (1) it is income from trade or business, (2) such trade or business is regularly carried on by the organization, and (3) the conduct of such trade or business is not substantially related (other than through the

production of funds) to the organization's performance of its exempt functions.

(b) *Trade or business.* The primary objective of adoption of the unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete. On the other hand, where an activity does not possess the characteristics of a trade or business within the meaning of section 162, such as when an organization sends out low cost articles incidental to the solicitation of charitable contribution, the unrelated business income tax does not apply since the organization is not in competition with taxable organizations. However, in general, any activity of a section 511 organization which is carried on for the production of income and which otherwise possesses the characteristics required to constitute "trade or business" within the meaning of section 162 - and which, in addition, is not substantially related to the performance of exempt functions - presents sufficient likelihood of unfair competition to be within the policy of the tax. Accordingly, for purposes of section 513 the term "trade or business" has the same meaning it has in section 162, and generally includes any activity carried on for the production of income from the sale of goods or performance of services. Thus, the term "trade or business" in section 513 is not limited to integrated aggregates of assets, activities and good will which comprise businesses for the purposes of certain other provisions of the Internal Revenue Code. Activities of producing or distributing goods or performing services from which a particular amount of gross income is derived do not lose identity as trade or business merely because

they are carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization. Thus, for example, the regular sale of pharmaceutical supplies to the general public by a hospital pharmacy does not lose identity as trade or business merely because the pharmacy also furnishes supplies to the hospital and patients of the hospital in accordance with its exempt purposes or in compliance with the terms of section 513(a)(2). Similarly, activities of soliciting, selling, and publishing commercial advertising do not lose identity as a trade or business even though the advertising is published in an exempt organization periodical which contains editorial matter related to the exempt purposes of the organization. However, where an activity carried on for the production of income constitutes an unrelated trade or business, no part of such trade or business shall be excluded from such classification merely because it does not result in profit.

(c) *Regularly carried on* - (1) *General principles*. In determining whether trade or business from which a particular amount of gross income derives is "regularly carried on," within the meaning of section 512, regard must be had to the frequency and continuity with which the activities productive of the income are conducted and the manner in which they are pursued. This requirement must be applied in light of the purpose of the unrelated business income tax to place exempt organization business activities upon the same tax basis as the nonexempt business endeavors with which they compete. Hence, for example, specific business activities of an exempt organization will ordinarily be deemed to be "regularly carried on" if they manifest a frequency and continuity, and are pursued in a

manner, generally similar to comparable commercial activities of nonexempt organizations.

(2) *Application of principles in certain cases* - (i) *Normal time span of activities.* Where income producing activities are of a kind normally conducted by nonexempt commercial organizations on a year-round basis, the conduct of such activities by an exempt organization over a period of only a few weeks does not constitute the regular carrying on of trade or business. For example, the operation of a sandwich stand by a hospital auxiliary for only two weeks at a state fair would not be the regular conduct of trade or business. However, the conduct of year-round business activities for one day each week would constitute the regular carrying on of trade or business. Thus, the operation of a commercial parking lot on Saturday of each week would be the regular conduct of trade or business. Where income producing activities are of a kind normally undertaken by nonexempt commercial organizations only on a seasonal basis, the conduct of such activities by an exempt organization during a significant portion of the season ordinarily constitutes the regular conduct of trade or business. For example, the operation of a track for horse racing for several weeks of a year would be considered the regular conduct of trade or business because it is usual to carry on such trade or business only during a particular season.

(ii) *Intermittent activities; in general.* In determining whether or not intermittently conducted activities are regularly carried on, the manner of conduct of the activities must be compared with the manner in which commercial activities are normally pursued by nonexempt organizations. In general, exempt organization business activities which are engaged in only discontinuously or periodically will not be considered

regularly carried on if they are conducted without the competitive and promotional efforts typical of commercial endeavors. For example, the publication of advertising in programs for sports events or music or drama performances will not ordinarily be deemed to be the regular carrying on of business. Similarly, where an organization sells certain types of goods or services to a particular class of persons in pursuance of its exempt functions or "primarily for the convenience" of such persons within the meaning of section 513(a)(2) (as, for example, the sale of books by a college bookstore to students or the sale of pharmaceutical supplies by a hospital pharmacy to patients of the hospital), casual sales in the course of such activity which do not qualify as related to the exempt function involved or as described in section 513(a)(2) will not be treated as regular. On the other hand, where the nonqualifying sales are not merely casual, but are systematically and consistently promoted and carried on by the organization, they meet the section 512 requirement of regularity.

(iii) *Intermittent activities; special rule in certain cases of infrequent conduct.* Certain intermittent income producing activities occur so infrequently that neither their recurrence nor the manner of their conduct will cause them to be regarded as trade or business regularly carried on. For example, income producing or fund raising activities lasting only a short period of time will not ordinarily be treated as regularly carried on if they recur only occasionally or sporadically. Furthermore, such activities will not be regarded as regularly carried on merely because they are conducted on an annually recurrent basis. Accordingly, income derived from the conduct of an annual dance or similar fund

raising event for charity would not be income from trade or business regularly carried on.

(d) *Substantially related*

(1) *In general.* Gross income derives from "unrelated trade or business," within the meaning of section 513(a), if the conduct of the trade or business which produces the income is not substantially related (other than through the production of funds) to the purposes for which exemption is granted. The presence of this requirement necessitates an examination of the relationship between the business activities which generate the particular income in question - the activities, that is, of producing or distributing the goods or performing the services involved - and the accomplishment of the organization's exempt purposes.

(2) *Type of relationship required.* Trade or business is "related" to exempt purposes, in the relevant sense, only where the conduct of the business activities has causal relationship to the achievement of exempt purposes (other than through the production of income); and it is "substantially related," for purposes of section 513, only if the causal relationship is a substantial one. Thus, for the conduct of trade or business from which a particular amount of gross income is derived to be substantially related to purposes for which exemption is granted, the production or distribution of the goods or the performance of the services from which the gross income is derived must contribute importantly to the accomplishment of those purposes. Where the production or distribution of the goods or the performance of the services does not contribute importantly to the accomplishment of the exempt purposes of an organization, the income from the sale of the goods or the performance of the services does not derive from the conduct of related trade or business.

Whether activities productive of gross income contribute importantly to the accomplishment of any purpose for which an organization is granted exemption depends in each case upon the facts and circumstances involved.

(4) *Application of principles* -

(iv) *Exploitation of exempt function.* In certain cases, activities carried on by an organization in the performance of exempt functions may generate good will or other intangibles which are capable of being exploited in commercial endeavors. Where an organization exploits such an intangible in commercial activities, the mere fact that the resultant income depends in part upon an exempt function of the organization does not make it gross income from related trade or business. In such cases, unless the commercial activities themselves contribute importantly to the accomplishment of an exempt purpose, the income which they produce is gross income from unrelated trade or business. The application of this subdivision is illustrated in the following examples:

Example (5). Y, an exempt university, provides facilities, instruction and faculty supervision for a campus newspaper operated by its students. In addition to news items and editorial commentary, the newspaper publishes paid advertising. The solicitation, sale, and publication of the advertising are conducted by students, under the supervision and instruction of the university. Although the services rendered to advertisers are of a commercial character, the advertising business contributes importantly to the university's educational program through the training of the students involved. Hence, none of the income derived from publication of the newspaper constitutes gross income

from unrelated trade or business. The same result would follow even though the newspaper is published by a separately incorporated section 501(c)(3) organization, qualified under the university rules for recognition of student activities, and even though such organization utilizes its own facilities and is independent of faculty supervision, but carries out its educational purposes by means of student instruction of other students in the editorial and advertising activities and student participation in those activities.

§301.6501(c)-1. Exceptions to general period of limitations on assessment and collection.

(d) *Extension by agreement.* The time prescribed by section 6501 for the assessment of any tax (other than the estate tax imposed by chapter 11 of the Code) may, prior to the expiration of such time, be extended for any period of time agreed upon in writing by the taxpayer and the district director or an assistant regional commissioner. The extension shall become effective when the agreement has been executed by both parties. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

APPENDIX H

PROPOSED TREASURY DEPARTMENT REGULATIONS

§1.513-4. Certain sponsorship not unrelated trade or business.

(a) *In general.* This section describes circumstances when income from certain sponsorship payments received by organizations subject to the unrelated business income tax imposed by section 511 are derived from a trade or business. This section does not apply to qualified convention and trade show activity. For rules governing qualified convention and trade show activity, see §1.513-3. This section also does not apply to income derived from the sale of advertising in exempt organization periodicals. The term periodical includes regularly scheduled and printed material that is not related to and primarily distributed in connection with a specific sponsored event. For rules governing the sale of advertising in exempt organization periodicals, see §1.512(a)-1(f). For rules governing whether an activity is regularly carried on, see §1.513-1(c).

(b) *Advertising.* With respect to sponsorship of the activities of exempt organizations, advertising means any message or other programming material which is broadcast or otherwise transmitted, published, displayed or distributed in exchange for any remuneration, and which promotes or markets any company, service, facility or product. Advertising includes any activity which promotes or markets any company, service, facility or product. Advertising does not include acknowledgments described in paragraph (c) of this section.

(c) *Acknowledgments.*

(1) *Description.* Acknowledgments are mere recognition of sponsorship payments. Acknowledgments may include the following, provided that the effect is identification of the sponsor rather than promotion of the sponsor's products, services or facilities: sponsor logos and slogans that do not contain comparative or qualitative descriptions of the sponsor's products, services, facilities or company; sponsor locations and telephone numbers; value-neutral descriptions, including displays or visual depictions, of a sponsor's product-line or services; and sponsor brand or trade names and product or service listings. Logos or slogans that are an established part of a sponsor's identity are not considered to contain comparative or qualitative descriptions.

(2) *Limitations.* Messages or other programming material that include the following constitute advertising: qualitative or comparative language; price information or other indications of savings or value associated with a product or service; a call to action; an endorsement; or an inducement to buy, sell, rent or lease the sponsor's product or service. Distribution of a sponsor's product by the sponsor or the exempt organization to the general public at the sponsored event, whether for free or for remuneration, is not considered an inducement to buy, sell, rent or lease the sponsor's product for purposes of this regulation. If any activities, messages or programming material constitute advertising with respect to a sponsorship payment, then all related activities, messages or programming material that might otherwise be acknowledgments are considered advertising.

(d) *Contracts.* The mere existence of a sponsorship contract does not necessarily mean that a sponsorship payment is income from advertising. The terms of the

agreement, not its existence or degree of detail, are relevant to the determination. Similarly, the terms of the agreement and not the status of those negotiating the agreement are relevant. Exclusivity arrangements do not, in themselves, mean that a sponsorship payment is advertising income.

(e) *Contingent payments.* Where the amount of the sponsorship payment is contingent, by contract or otherwise, upon factors such as attendance at an event or broadcast ratings, the sponsorship payment is considered advertising income. However, the fact that a sponsorship payment is contingent upon an event actually taking place or being broadcast does not, in itself, mean that the payment is advertising income.

(f) *Provision of facilities.* Provision of facilities, services or other privileges by an exempt organization to the sponsor or individuals designated by the sponsor *(e.g,* complimentary tickets, pro-am playing spots in golf tournaments or receptions for major donors) in connection with the sponsorship payment does not affect the determination of whether a sponsorship payment is advertising income.

(g) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. M, an exempt organization, organizes a marathon and walkathon at which it serves to participants drinks and other refreshments provided by a national corporation. M recognizes the assistance of the corporation by listing the name of the corporation in promotional fliers, in newspaper advertisements of the event and on T shirts worn by participants. M acknowledges prizes provided by the corporation or any other sponsor in the same manner. M changes the name of its event to include the name of the sponsor. M's activities

are acknowledgments of the sponsorship and not advertising.

Example 2. N, an art museum, organizes an exhibition and receives a large payment from a corporation to underwrite the production of the catalog for the exhibition. N acknowledges the corporation in materials publicizing the exhibition, including banners, posters, brochures and public service announcements. N also arranges a special tour of the exhibition for employees of the corporation and hosts a dinner for the corporation's executives. N's activities are acknowledgments of the payment and not advertising.

Example 3. O organizes sports tournaments for local charities across the country that are underwritten by an auto manufacturer. O acknowledges the sponsorship payment by including the manufacturer's name and logo in the title of the tournament and displaying the manufacturer's name and logo on signs, scoreboards and other printed material. The auto manufacturer receives complimentary admission passes and pro-am playing spots. Additionally, O displays the latest models of the sponsor's premier luxury cars in the tournament area. O's activities are acknowledgments of the payment and not advertising.

Example 4. P conducts an annual college football bowl game. P sells to commercial broadcasters the right to broadcast the bowl game on television and radio. A major corporation agrees to be the exclusive sponsor of the bowl game. The sponsorship payment includes amounts to be paid to the colleges participating in the bowl game. The detailed contract between P and the corporation provides that the name of the bowl game will include the name of the corporation. The contract further provides that the corporation's name and a special logo will appear on players' helmets and uniforms, on the scoreboard and

stadium signs, on the playing field, on cups used to serve drinks at the game, and on all related printed material distributed in connection with the game. The sponsorship agreement is contingent upon the game being broadcast on television and radio, but the amount of the sponsorship payment is not contingent upon the number of people attending the game or the television ratings. The contract provides that television cameras will focus on the corporation's name and logo on the field at certain intervals during the game. P's activities are acknowledgments of the payment and not advertising.

Example 5. Players on team Q wear uniforms provided by a major pizza chain which also underwrites the operational expenses of the team. The uniforms bear the name and logo of the chain. The sponsorship payments and uniforms are not advertising income to Q, because use of the name and logo is acknowledgment of the sponsorship and not advertising.

Example 6. R organizes an annual art festival. Restaurants sell food or provide samples at festival booths. Similarly, local artists and craft shops sell arts and crafts at the festival. The restaurants, artists and shops are recognized by R as sponsors of the event in the festival brochure. The recognition of these sponsors constitutes acknowledgment of the payments and not advertising

Example 7. S is a noncommercial broadcast station that airs a program sponsored by a local record shop. In recognition of that sponsorship, S broadcasts the following message: "This program has been underwritten by the Record Shop, where you can find all of your great hit music. The Record Shop is located at 123 Main Street. Give them a call today at 555-1234. This station is proud

to have the Record Shop as a sponsor." S's activities constitute advertising.

Example 8. T, an exempt symphony orchestra, performs a series of concerts. A program guide that contains notes on guest conductors and other information concerning the evening's program is distributed at each concert. Sponsors may underwrite a specific concert or may contribute to a single program guide. Sponsors are recognized in the program guide in either case and, therefore, their payments are sponsorship payments for purposes of this section. If T's recognition of a specific concert sponsor in the program guide promotes the sponsor's product, T's activities are advertising with respect to all amounts received from the sponsor for that concert even if other items in the program guide relating to the sponsor would otherwise be acknowledgments. T also mails to subscribers a monthly magazine that contains various articles on music but is not primarily related to and distributed in connection with a specific concert. This section does not apply to the magazine because it is a periodical.

Supreme Court, U.S.
FILED
JAN 16 1998
CLERK

No. 97-833

In the Supreme Court of the United States

OCTOBER TERM, 1997

MASSACHUSETTS STATE POLICE ASSOCIATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a duly-executed consent to extend the statute of limitations extended the period within which the Internal Revenue Service could assess a tax against petitioner.

2. Whether the annual publication by petitioner of "The Constabulary" constituted a regularly conducted trade or business that gave rise to unrelated business taxable income under Section 511 of the Internal Revenue Code, 26 U.S.C. 511.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 125 F.3d 1. The opinion of the United States Tax Court (Pet. App. 20a-53a) is reported at 72 T.C.M. (CCH) 582.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on August 20, 1997. The petition for certiorari was filed on November 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 511-513 of the Internal Revenue Code, 26 U.S.C. 511-513, are set forth at Pet. App. 57a-59a.

STATEMENT

1. The State Police Association of Massachusetts is a tax-exempt labor organization. During the years at issue, petitioner annually published and distributed The Constabulary, a yearbook that contained articles and pictures of interest to petitioner's membership (Pet. App. 2a). The Constabulary also contained displays and listings paid for by businesses that had been solicited by petitioner for this purpose. Petitioner's officials routinely referred to The Constabulary as the "ad book" (*id.* at 22a). Each issue of The Constabulary contained a message urging its readers to "consider" the businesses appearing in the publication when making purchases (*id.* at 30a).

Commercial displays in The Constabulary ranged in size from one-sixth of a page to a full page, depending on the amount paid by the advertiser (Pet. App. 33a). The businesses that purchased displays were listed alphabetically in The Constabulary in an "Advertisers Index" or "Index to Display Ads." The Constabulary also contained business listings that consisted of two or three lines of information that identified the lister by name, address, and, in most issues, telephone number (*id.* at 29a-30a).

Petitioner hired a contractor to conduct the sale of displays and listings in The Constabulary. The contractor hired and supervised telephone solicitors who called potential advertisers using a script approved by petitioner. The telephone solicitors contacted businesses identified through the use of various busi-

ness directories. Petitioner monitored the solicitations, which were conducted during approximately 46 weeks of the year (Pet. App. 9a, 15a).

Petitioner published 5,000 to 7,000 copies of The Constabulary each year. Distribution of 300 to 400 copies took place at an annual picnic and sports day known as the Police Chase (Pet. App. 28a, 30a-31a).[1] The remaining copies of The Constabulary were distributed at state police barracks and to the advertisers who purchased displays and listings (*id.* at 31a).

During the tax years at issue in this case, petitioner's receipts from the sale of displays and listings in The Constabulary totaled $8,788,211. Those revenues yielded a net income of $3,752,288 (Pet. App. 32a). On November 13, 1989, petitioner filed IRS Forms 990 ("Return of Organization Exempt from Income Tax") for the periods ended April 30, 1986, 1987, 1988, 1989 and July 31, 1989. Those returns did not report any taxes due for those periods. Petitioner did not file any Forms 990-T ("Unrelated Business Taxable Income") to report the receipt of unrelated business taxable income during those periods (*id.* at 36a).

2. The Internal Revenue Service determined that petitioner's receipts from the sale of displays and listings in The Constabulary constituted advertising income subject to tax under Section 511 of the Internal Revenue Code, 26 U.S.C. 511. That Section imposes a tax on the "unrelated business taxable income" of an organization otherwise exempt from tax. "Unrelated business taxable income" is gener-

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[1] The Constabulary did not serve as a program guide for the Police Chase (Pet. App. 31a).

ally defined in Section 512 of the Code as the income realized from an unrelated trade or business that is "regularly carried on" (26 U.S.C. 512(a)(1)).

During the period that the statute of limitations on assessment of taxes for the above-described periods remained open,[2] petitioner's counsel executed a Form 872 that extended the time to assess "any Federal Income tax on any return(s) made by or for [petitioner] for the period(s) ended April 30, 1986, 1987, 1988, 1989 and July 31, 1989" to April 30, 1993 (Pet. App. 34a). Prior to the expiration of that extended period of limitations, the IRS issued a notice of deficiency that asserted that petitioner was liable for deficiencies in tax for each of the periods identified in the extension agreement, as well as for the periods ended July 31, 1990, and July 31, 1991 (for which the three-year assessment period was still open without extension) (*id.* at 3a-4a, 38a).

3. Petitioner sought review of the deficiency determination in the Tax Court. Following a trial, the Tax Court held petitioner liable for tax under Section 511 for the unrelated business income that it earned from the sale of advertising in The Constabulary (Pet. App. 20a-53a).

a. As a threshold matter, the Tax Court concluded that the statute of limitations on assessment of this tax remained open because of petitioner's execution of the Form 872 extension agreement. The court

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[2] The IRS generally must assess any tax within three years after the return is filed that gives rise to the tax liability. 26 U.S.C. 6501(a). That limitations period may be extended, however, by an agreement in writing executed by the taxpayer and a representative of the Internal Revenue Service prior to the expiration of the period of limitations. 26 U.S.C. 6501(c)(4).

rejected petitioner's argument that the Form 872 was ineffective, by its terms, because it extended only the time to assess taxes due "on any return[s] made by [petitioner]" and petitioner had filed no returns on which a liability for tax was reported. The court concluded that the extension agreement was designed to extend the period within which the IRS might assess any tax on petitioner's unrelated business taxable income (Pet. App. 35a-38a). The court further stated that *if* the Form 872 could not be construed in that manner, the court would reform the document to effectuate that clear intent of the parties (*id.* at 37a n.4).

b. The Tax Court held that petitioner's sale of displays and listings in The Constabulary constituted the trade or business of advertising. The court discounted the testimony of petitioner's expert witness, which was based upon "incomplete information" about petitioner's activities (Pet. App. 40a-41a). In concluding that petitioner was engaged in the trade or business of advertising, the Tax Court noted that the displays in The Constabulary contained the usual elements of advertisements—such as blocking, illustrations, signatures, trademarks, and emblems—and that The Constabulary included an "Advertiser's Index" (*id.* at 42a). The court also noted that petitioner and its contractors expressly referred to the displays and listings in The Constabulary as advertising (*id.* at 42a-43a).

The Tax Court also found that petitioner's advertising business was "regularly carried on" (26 U.S.C. 512(a)(1)). The court noted that petitioner had engaged contractors to act as petitioner's agents in soliciting advertising for, and publishing, The Constabulary over a period of several years (Pet.

App. 48a-49a). The court rejected petitioner's argument that only the activity of publishing The Constabulary—independent of the sales of advertising—could be considered. In particular, the court rejected petitioner's reliance on *NCAA* v. *Commissioner*, 914 F.2d 1417 (10th Cir. 1990), for that proposition. The Tax Court explained that, in *NCAA*, the court had defined the taxpayer's trade or business as the publication of advertisements in basketball programs during the time span of a basketball tournament. In the present case, by contrast, "petitioner's solicitation, sale, and publishing of advertising space was undertaken apart from any discrete event or show with a limited, specified duration" (Pet. App. 51a).[3] Because petitioner had regularly carried on its business, the court found petitioner liable for the tax imposed on unrelated business income under Section 511 of the Code (*id.* at 52a).

4. The court of appeals affirmed. The court agreed with the Tax Court that the Form 872 extended the statute of limitations on assessment of taxes under Section 511 of the Code. The court stated that petitioner was advancing "a purely linguistic argument" and, like the Tax Court, refused to accept petitioner's "slippery syllogism" (Pet. App. 4a). The court of appeals concluded that the Tax Court had correctly read the phrase "return(s) made" in the Form 872 to encompass returns "deemed" to be made (*id.* at 5a). The court of appeals found "non-sensical" petitioner's contention that the parties extended "the limitation period for assessment of taxes due on a return on

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[3] Petitioner did not dispute that an advertising trade or business was unrelated to its tax-exempt purposes (Pet. App. 8a n.3, 44a).

which, by operation of law, no tax conceivably could be due" (*ibid.*). The court stated that a document should not be construed to yield a nonsensical result; instead, it should be given a meaning that makes it "legally functional rather than * * * legally dysfunctional" (*ibid.*).[4] In view of this holding, the court of appeals found it unnecessary to consider the Tax Court's alternative conclusion that reformation of the Form 872 extension agreement to achieve the clear intent of the parties would be appropriate (*id.* at 7a n.2).

The court of appeals further agreed that petitioner's sale of displays and listings in The Constabulary constituted the trade or business of advertising (Pet. App. 9a-16a). The court of appeals observed that petitioner exercised "significant control over the sales effort, the handling of the funds generated, and the publication of The Constabulary" (*id.* at 9a). The court stated that "[e]ven a cursory glance at the yearbook, the pricing structure, and the terminology used by the Association belies the belated claim that the ads and listings were not 'advertising' as that term is commonly understood" (*id.* at 11a). The court noted that its conclusion in this case was supported by the similar holding of the Seventh Circuit in *Fraternal Order of Police* v.

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[4] The court of appeals noted that it was well settled that the filing of a Form 990 informational return starts the statute of limitations for assessing the unrelated business income tax, even where no unrelated business income tax return (Form 990-T) is filed. Petitioner could not link the two forms for purposes of starting the statute of limitations on assessment but then decouple the forms when construing an agreement to extend that statute of limitations (Pet. App. 6a).

Commissioner, 833 F.2d 717 (1987), which involved substantially similar facts (Pet. App. 11a-12a).

The court of appeals rejected petitioner's contention that its trade or business was not "regularly carried on by it" (26 U.S.C. 512(a)(1)). The court of appeals first noted that the decision of the Tenth Circuit in *NCAA* was inapposite because, in that case, "the advertising activity was tied to the program for a specific event" (Pet. App. 14a). The court explained that, in determining the regularity with which the business was carried on in *NCAA*, the Tenth Circuit had properly looked only to "the time frame of [a particular] event" (*id.* at 15a). By contrast, "[i]n a case like this one, where the publication of an ad book is not pegged to a particular event, a court must assay the activities which collectively comprise the business, and look to the overall time frame in which they occurred" (*ibid.*). Since petitioner's activities spanned 46 weeks each year, the court concluded that petitioner's business of advertising was conducted with "more than sufficient regularity by any standard" (*ibid.*).

The court of appeals rejected petitioner's argument that it did not carry on its advertising activity with the same entrepreneurial zeal of a commercial operator. The court noted that, although one purpose behind the unrelated business income tax was to create a more level playing field between taxable and tax-exempt enterprises, the unrelated business income tax does not require that competitive zeal or ability be demonstrated (Pet. App. 15a-16a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. As a general rule, taxes must be assessed within three years from the date a taxpayer files a return. 26 U.S.C. 6501(a). The Commissioner, however, ordinarily may not assess a tax based upon a deficiency until 90 days after a notice of deficiency has been issued to the taxpayer. 26 U.S.C. 6213(a). Moreover, if, during that 90 day period, the taxpayer petitions the Tax Court for review of the Commissioner's determination, the Commissioner ordinarily may not assess the tax until the decision of the Tax Court becomes final. 26 U.S.C. 6213(a); see 26 U.S.C. 7481.

The statutory period of limitation for assessment of a tax is suspended during the period that the Commissioner is prohibited from making an assessment. 26 U.S.C. 6503(a)(1). The consequence of these provisions, taken as a whole, is that the notice of deficiency must be issued within the limitations period provided in 26 U.S.C. 6501. Under Section 6501(c)(4) of the Code, however, the taxpayer and the Commissioner may agree in writing to extend the period of limitation at any time before it expires. Form 872 (Consent to Extend the Time to Assess Tax) is the form employed by the IRS for this purpose.

Petitioner claimed in the courts below that the language of the Form 872 was not effective to extend the period of limitations in this case because that Form extended only the period as to taxes "due on any return(s) made by" petitioner and the information

returns that petitioner had filed did not and could not report any taxes as being due (Pet. App. 4a, 37a). Those courts correctly held, however, that the Form 872 should be interpreted to make sense, rather than nonsense (*id.* at 5a). In view of the parties' evident intent to extend the period of limitations for the assessment of a tax on petitioner's unrelated business income, they correctly concluded that the "return(s) made" language of the Form 872 includes a "deemed" return on which unrelated business income was to be reported. As the court of appeals observed, it is "nonsensical" for petitioner to suggest that the parties sought to extend the statute of limitations with respect to a return on which no tax *could* be due (*ibid.*).

Petitioner does not directly attack the decision of the court of appeals. Instead, ignoring the conclusion of that court that the terms of the Form 872 reflect an effective agreement to extend the statute of limitations, petitioner seeks review of a question that was *not* reached by the court of appeals—whether the Tax Court has equitable jurisdiction to reform an instrument. Although the Tax Court noted that, if necessary, the language of the Form 872 could be reformed to effectuate the parties' intent (Pet. App. 37a n.4), that conclusion was not necessary to its decision because the court correctly held that the language of the Form 872 was sufficient and did not require reformation (*id.* at 37a-38a). The court of appeals also expressly concluded that it was unnecessary to reform the extension agreement to accomplish the parties' clear intent (*id.* at 7a n.2). The present case thus does not provide a suitable vehicle for addressing the question that petitioner seeks to raise.

2. a. Under Section 511 of the Internal Revenue Code, a tax-exempt organization is subject to tax on its unrelated business taxable income. Section 512 of the Code defines "unrelated business taxable income" as "the gross income derived by any organization from any unrelated trade or business * * * regularly carried on by it." 26 U.S.C. 512(a)(1). Income received by an otherwise tax exempt entity is thus taxable if derived from an activity that (i) is a trade or business, (ii) is regularly carried on and (iii) is not substantially related to the organization's exempt purpose. *United States* v. *American Bar Endowment*, 477 U.S. 105, 109-110 (1986); *United States* v. *American College of Physicians*, 475 U.S 834, 838-839 (1986).

The courts below correctly concluded that each of these factual elements of the test for "unrelated business taxable income" is satisfied in this case. Petitioner contracted with a firm to conduct telephone solicitations aimed at selling displays and listings in The Constabulary, an annual publication that petitioner's officials referred to as the "ad book." As the court of appeals stated, these displays and listings manifested all of the characteristics of advertising (Pet. App. 11a):

> the displays look like ads, the directory listings function as guides to products and services, and [petitioner] itself, at least during the first four years of the undertaking, consistently referred to the displays and listings as ads rather than as acknowledgements.

Moreover, petitioner's members supervised the conduct of the telephone solicitations, provided the scripts used by the telephone solicitors and moni-

tored the telephone solicitations to insure that they were conducted in accordance with petitioner's standards. The telephone solicitors worked approximately 46 weeks of the year selling displays and listings in The Constabulary (id. at 26-27a). The sales of advertising in The Constabulary generated more than $8 million in receipts and more than $3 million in profits for petitioner during the years at issue in this case (*id.* at 32a). On this record, the court of appeals properly affirmed the finding of the Tax Court that petitioner was engaged in the business of advertising and that such business was regularly carried on. That finding, concurred in by both courts below, does not warrant review by this Court. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

b. The decision of the courts below is consistent with the decision of the Seventh Circuit in *Fraternal Order of Police* v. *Commissioner*, 833 F.2d 717 (1987), which held on similar facts that payments for advertising listings in the journal of a tax exempt organization created unrelated business taxable income. Petitioner asserts (Pet. 6-12), however, that the decision in this case conflicts with the decision of the Tenth Circuit in *NCAA* v. *Commissioner*, *supra*, which held that income earned by the NCAA from the sale of advertising in the program guide for its annual basketball tournament was not taxable under Section 511 of the Code. In *NCAA*, the court concluded that the dissemination of the advertising during the course of the annual basketball tournament was too ephemeral an activity to be treated as "regularly carried on" for purposes of the tax on unrelated business income. 914 F.2d at 1423.

In the present case, however, there was no such ephemeral nature to the advertising activity of petitioner.[5] As the court of appeals noted (Pet. App. 14a-15a), the finding of the Tax Court that The Constabulary was not published for use in conjunction with any special event was well supported in the record. In determining whether the taxpayer's advertising activities are "regularly carried on," the court of appeals applied the same legal test to factually distinct records. Different factual applications of the same legal test do not establish a conflict of decisions that warrants review by this Court.[6]

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[5] The court of appeals therefore correctly concluded (Pet. App. 15a) that "the mode of analysis used in *NCAA* and *Suffolk County [Patrolmen's Benevolent Ass'n* v. *Commissioner*, 77 T.C. 1314 (1981)] cannot be employed here." As in *NCAA*, the court concluded in *Suffolk County* that income earned by a tax-exempt organization from the sale of advertising in the program of its annual vaudeville show was not subject to tax under Section 511 because advertising was not "regularly carried on" by the taxpayer. 77 T.C. at 1321. As the Tax Court noted in the present case, however (Pet. App. 50a), the court in *Suffolk County* regarded the advertising activity of the taxpayer to be connected only with its annual vaudeville show.

[6] Petitioner further contends (Pet. 15) that the Court should "strik[e] down" Proposed Treasury Regulation § 1.513-4 because it discriminates unjustifiably between different tax exempt organizations. A proposed regulation is not a proper subject of litigation. Nor was it applied in this case. In any event, petitioner did not challenge the validity of the proposed regulation in the court below and review of a contention that was not raised or addressed below is not warranted. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 377-378 (1996); *Holly Farms Corp.* v. *NLRB*, 116 S. Ct. 1396, 1402 n.7 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1998

Supreme Court, U.S.
FILED
JAN 23 1998
CLERK

(3)

No. 97-833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE POLICE ASSOCIATION OF MASSACHUSETTS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER

The State Police Association of Massachusetts (Association) respectfully replies to the Brief for the Respondent in Opposition as follows:

In footnote numbered 6 on page 13 of the Brief for the Respondent in Opposition, the Government states that the Association did not challenge the validity of Proposed Treasury Regulations §1.513-4 in the Court of Appeals. This is an error. In its opening brief in that court the Association raised the inconsistency it presented in its Petition, stating, in part:

> Thus, the Nike "swoosh", conspicuously placed on the uniforms of countless athletes playing for tax exempt colleges and universities on national television and the Federal Express and Mobil logos spread across similarly televised football fields on New Year's Day do not constitute advertising. Prop. Regs. §1.513-4(g), Ex. 4 and 5. It defies all logic for advertising to include the displays and listings of The Constabulary, no more than 10% of which contained meaningful content, and to exclude acknowledgements of corporate sponsors. By these standards, the displays and listings of The Constabulary were not advertising.

The Court of Appeals addressed the Association's argument in its opinion. (Pet. App. 11a).

Respectfully submitted.

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January 23, 1998